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CASES

ON

THE CONFLICT OF LAWS

SELECTED FROM DECISIONS OF

ENGLISH AND AMERICAN COURTS

BY

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AMERICAN CASEBOOK SERIES

JAMES BROWN SCOTT

GENERAL EDITOR

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To

JOHN H. WIGMORE

as a slight recognition of his great services
to scholarship in the law.

687125

THE AMERICAN CASEBOOK SERIES.

For years past the science of law has been taught by lectures, the use of text-books and more recently by the detailed study, in the class-room, of selected cases.

Each method has its advocates, but it is generally agreed that the lecture system should be discarded because in it the lecturer does the work and the student is either a willing receptacle or offers a passive resistance. It is not too much to say that the lecture system is doomed.

Instruction by the means of text-books as a supplement or substitute for the formal lecture has made its formal entry into the educational world and obtains widely; but the system is faulty and must pass away as the exclusive means of studying and teaching law. It is an improvement on the formal lecture in that the student works, but if it cannot be said that he works to no purpose, it is a fact that he works from the wrong end. The rule is learned without the reason, or both rule and reason are stated in the abstract as the resultant rather than as the process. If we forget the rule we cannot solve the problem; if we have learned to solve the problem it is a simple matter to formulate a rule of our own. The text-book method may strengthen the memory; it may not train the mind, nor does it necessarily strengthen it. A text, if it be short, is at best a summary, and a summary presupsuposes previous knowledge.

If, however, law be considered as a science rather than a collection of arbitrary rules and regulations, it follows that it should be studied as a science. Thus to state the problem is to solve it; the laboratory method has displaced the lecture, and the text yields to the actual experiment. The law reports are in more senses than one books of experiments, and, by studying the actual case, the student co-operates with the judge and works out the conclusion however complicated the facts or the principles involved. A study of cases arranged historically develops the knowledge of the law, and each case is seen to be not an isolated fact but a necessary link in the chain of development. The study of the case is clearly the most practical method, for the student already does in his undergraduate days what he must do all his life; it is curiously the most theoretical and the most practical. For a discussion of the case in all its parts develops analysis, the comparison of many cases establishes a general principle, and

the arrangement and classification of principles dealing with a subject make the law on that subject.

In this way TRAINING AND KNOWLEDGE, the means and the end of legal study, go hand and hand.

The obvious advantages of the study of law by means of selected cases make its universal adoption a mere question of time.

The only serious objections made to the case method are that it takes too much time to give a student the requisite knowledge of the subject in this way and that the system loses sight of the difference between the preparation of the student and the lifelong training of the lawyer. Many collections of cases seem open to these objections, for they are so bulky that it is impossible to cover a particular subject with them in the time ordinarily allotted to it in the class. In this way the student discusses only a part of a subject. His knowledge is thorough as far as it goes, but it is incomplete and fragmentary. The knowledge of the subject as a whole is deliberately sacrificed to training in a part of the subject.

It would seem axiomatic that the size of the casebook should correspond in general to the amount of time at the disposal of instructor and student. As the time element is, in most cases, a nonexpansive quantity, it necessarily follows that, if only a half to two-thirds of the cases in the present collections can be discussed in class, the present casebooks are a third to a half too long. From a purely practical and economic standpoint it is a mistake to ask students to pay for 1,200 pages when they can only use 600, and it must be remembered that in many schools, and with many students in all schools, the matter of the cost of casebooks is important. Therefore, for purely practical reasons, it is believed that there is a demand for casebooks physically adapted and intended for use as a whole in the class-room.

But aside from this, as has been said, the existing plan sacrifices knowledge to training. It is not denied that training is important, nor that for a law student, considering the small amount of actual knowledge the school can hope to give him in comparison with the vast and daily growing body of the law, it is more important than mere knowledge. It is, however, confidently asserted that knowledge is, after all, not unimportant, and that, in the inevitable compromise between training and knowledge, the present casebooks not only devote too little attention relatively to the inculcation of knowledge, but that they sacrifice unnecessarily knowledge to training. It is believed that a greater effort should be made to cover the general principles of a given subject in the time allotted, even at the expense of a considerable sacrifice of detail. But in this proposed readjustment of the means to the end, the fundamental fact cannot be overlooked that law is a developing science and that its present can only be understood through the medium of its past. It is recognized as imperative that a sufficient number of cases be given under each topic

treated to afford a basis for comparison and discrimination; to show the development of the law of the particular topic under discussion; and to afford the mental training for which the case system necessarily stands. To take a familiar illustration: If it is proposed to include in a casebook on Criminal Law one case on abortion, one on libel, two on perjury, one on larceny from an office, and if in order to do this it is necessary to limit the number of cases on specific intent to such a degree as to leave too few on this topic to develop it fully and to furnish the student with training, then the subjects of abortion, libel, perjury, and larceny from an office should be wholly omitted. The student must needs acquire an adequate knowledge of these subjects, but the training already had in the underlying principles of criminal law will render the acquisition of this knowledge comparatively easy. The exercise of a wise discretion would treat fundamentals thoroughly: principle should not yield to detail.

Impressed by the excellence of the case system as a means of legal education, but convinced that no satisfactory adjustment of the conflict between training and knowledge under existing time restrictions has yet been found, the General Editor takes pleasure in announcing a series of scholarly casebooks, prepared with special reference to the needs and limitations of the class-room, on the fundamental subjects of legal education, which, through a judicious rearrangement of emphasis, shall provide adequate training combined with a thorough knowledge of the general principles of the subject. The collection will develop the law historically and scientifically; English cases will give the origin and development of the law in England; American cases will trace its expansion and modification in America; notes and annotations will suggest phases omitted in the printed case. Cumulative references will be avoided, for the footnote may not hope to rival the digest.

The law will thus be presented as an organic growth, and the necessary connection between the past and the present will be obvious.

The importance and difficulty of the subject as well as the time that can properly be devoted to it will be carefully considered so that each book may be completed within the time allotted to the particular subject.

It is equally obvious that some subjects are treated at too great length, and that a less important subject demands briefer treatment. A small book for a small subject.

In this way it will be alike possible for teacher and class to complete each book instead of skimming it or neglecting whole sections; and more subjects may be elected by the student if presented in shorter form based upon the relative importance of the subject and the time allotted to its mastery.

Training and knowledge go hand in hand, and Training and Knowledge are the keynotes of the series.

If it be granted that all, or nearly all, the studies required for admission to the bar should be studied in course by every student—and the soundness of this contention can hardly be seriously doubted—it follows necessarily that the preparation and publication of collections of cases exactly adapted to the purpose would be a genuine and by no means unimportant service to the cause of legal education. And this result can best be obtained by the preparation of a systematic series of casebooks constructed upon a uniform plan under the supervision of an editor in chief.

For the basis of calculation the hour has been taken as the unit. The General Editor's personal experience, supplemented by the experience of others in the class-room, leads to the belief that approximately a book of 400 pages may be covered by the average student in half a year of two hours a week; that a book of 600 pages may be discussed in class in three hours for half a year; that a book of 800 pages may be completed by the student in two hours a week throughout the year; and a class may reasonably hope to master a volume of 1,000 pages in a year of three hours a week. The general rule will be subject to some modifications in connection with particular topics on due consideration of their relative importance and difficulty, and the time ordinarily allotted to them in the law school curriculum.

The following subjects are deemed essential in that a knowledge of them (with the exception of International Law and General Jurisprudence) is universally required for admission to the bar:

Administrative Law.
Agency.
Bills and Notes.
Carriers.
Contracts.
Corporations.
Constitutional Law.
Criminal Law.
Criminal Procedure.
Common-Law Pleading.
Conflict of Laws.
Code Pleading.
Damages.
Domestic Relations.
Equity.
Equity Pleading.
Evidence.
Insurance.
International Law.
Jurisprudence.
Mortgages.
Partnership.
Personal Property, including the Law of Bailment.
Real Property. { 1st Year. / 2d " / 3d "
Public Corporations.
Quasi Contracts.
Sales.
Suretyship.
Torts.
Trusts.
Wills and Administration.

International Law is included in the list of essentials from its intrinsic importance in our system of law. As its principles are simple in comparison with municipal law, as their application is less technical,

and as the cases are generally interesting, it is thought that the book may be larger than otherwise would be the case.

As an introduction to the series a book of Selections on General Jurisprudence of about 500 pages is deemed essential to completeness.

The preparation of the casebooks has been intrusted to experienced and well-known teachers of the various subjects included, so that the experience of the class-room and the needs of the students will furnish a sound basis of selection.

While a further list is contemplated of usual but relatively less important subjects as tested by the requirements for admission to the bar, no announcement of them is made at present.

The following gentlemen of standing and repute in the profession are at present actively engaged in the preparation of the various casebooks on the indicated subjects:

George W. Kirchwey, Dean of the Columbia University, School of Law. *Subject, Real Property.*

Nathan Abbott, Professor of Law, Columbia University. (Formerly Dean of the Stanford University Law School.) *Subject, Personal Property.*

Frank Irvine, Dean of the Cornell University School of Law. *Subject, Evidence.*

Harry S. Richards, Dean of the University of Wisconsin School of Law. *Subject, Corporations.*

James Parker Hall, Dean of the University of Chicago School of Law. *Subject, Constitutional Law.*

William R. Vance, Dean of the George Washington University Law School. *Subject, Insurance.*

Charles M. Hepburn, Professor of Law, University of Indiana. *Subject, Torts.*

William E. Mikell, Professor of Law, University of Pennsylvania. *Subjects, Criminal Law and Criminal Procedure.*

George P. Costigan, Jr., Dean of the University of Nebraska School of Law. *Subject, Wills and Administration.*

Floyd R. Mechem, Professor of Law, Chicago University. *Subject, Damages.* (Co-author with Barry Gilbert.)

Barry Gilbert, Professor of Law, University of Illinois. *Subject, Damages.* (Co-author with Floyd R. Mechem.)

Thaddeus D. Kenneson, Professor of Law, University of New York. *Subject, Trusts.*

Charles Thaddeus Terry, Professor of Law, Columbia University. *Subject, Contracts.*

Albert M. Kales, Professor of Law, Northwestern University. *Subject, Persons.*

Edwin C. Goddard, Professor of Law, University of Michigan. *Subject, Agency.*

Howard L. Smith, Professor of Law, University of Wisconsin. *Subject, Bills and Notes.*

Edward S. Thurston, Professor of Law, George Washington University. *Subject, Quasi Contracts.*

Crawford D. Hening, Professor of Law, University of Pennsylvania. *Subject, Suretyship.*

Clarke B. Whittier, Professor of Law, University of Chicago. *Subject, Pleading.*

Eugene A. Gilmore, Professor of Law, University of Wisconsin. *Subject, Partnership.*

Joshua R. Clark, Jr., Assistant Professor of Law, George Washington University. *Subject, Mortgages.*

Ernst Freund, Professor of Law, University of Chicago. *Subject, Administrative Law.*

Frederick Green, Professor of Law, University of Illinois. *Subject, Carriers.*

Ernest G. Lorenzen, Professor of Law, George Washington University. *Subject, Conflict of Laws.*

William C. Dennis, Professor of Law, George Washington University. *Subject, Public Corporations.*

James Brown Scott, Professor of Law, George Washington University; formerly Professor of Law, Columbia University, New York City. *Subjects, International Law; General Jurisprudence; Equity.*

The following books of the Series are now published, or in press: Partnership, by Eugene A. Gilmore, Professor of Law, University of Wisconsin; Criminal Law, by Wm. E. Mikell, Professor of Law, University of Pennsylvania; Damages, by Barry Gilbert, Professor of Law, University of Illinois; Conflict of Laws, by Ernest G. Lorenzen, Professor of Law, George Washington University; Trusts, by Thaddeus D. Kenneson, Professor of Law, University of New York.

JAMES BROWN SCOTT,
General Editor.

Washington, D. C., January, 1909.

PREFACE.

With the growing intercourse among nations the subject of Conflict of Laws (Private International Law) must constantly gain in importance in legal practice. The more cosmopolitan society becomes, the more useful and indispensable will be a knowledge of the rules governing this subject in foreign countries. The practical value to the lawyer of a general familiarity with such foreign rules suggested to the editor the appropriateness of indicating under each topic treated the fundamental differences existing between the Anglo-American and continental systems. Considerations of space and a regard for the primary object of this work as a student's book made it necessary to limit the exposition of the continental law to that of France, Germany, and Italy—the countries wherein this newest branch of legal science has found its highest development.

For the sake of brevity I have referred to the Journal du Droit International Privé, edited by E. Clunet, to the Revue de Droit International Privé et de Droit Pénal International, edited by A. Darras, to the Revue Internationale du Droit Maritime, edited by F. C. Autran, and to the Zeitschrift für Internationales Privat- und Strafrecht, edited at present by Th. Niemeyer, by the name of their respective editors.

The labor involved in the presentation of the French and Italian law has been materially lightened by the assistance of J. Basdevant, Professor at the University of Grenoble, and of G. C. Buzzati, Professor at the University of Pavia and member of the Institute of International Law. Thanks to the collaboration of Professor Buzzati, it has become possible, also, to refer to Italian cases contained in reports other than the Annali, Giurisprudenza Italiana, Foro Italiano, La Legge, and Monitore dei Tribunali, which were the only Italian reports accessible to me. It is with pleasure that I acknowledge my obligations to these gentlemen for their hearty co-operation.

In connection with the English and American law I have derived the greatest assistance from the well-known treatises on Conflict of Laws by Dicey, Foote, Westlake, Minor, Story, and Wharton, and from the most excellent collection of cases by Professor Joseph H. Beale, Jr. For want of better or equally good illustrative cases it has become necessary to reproduce in this work many of the cases used by Professor Beale.

Washington, D. C., January, 1909. E. G. L.

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CASES ON THE CONFLICT OF LAWS.

PART I.

GENERAL PROVISIONS.

CHAPTER I.

NATURE OF THE SUBJECT.

"Whenever a case containing any foreign element calls for decision, the judge before whom it is tried must, either expressly or tacitly, find an answer to at least two preliminary questions:

"First question: Is the case before him one which any English court has, according to the law of England, a right to determine? * * * The first question is a question of jurisdiction (forum).

"Second question: What (assuming the question of jurisdiction to be answered affirmatively) is the body of law with reference to which the rights of the parties are according to the principles of the law of England to be determined? * * *

"This second question is an inquiry not as to jurisdiction, but as to the choice of law (lex). * * *

"The two foregoing questions always require an answer whenever a case contains any foreign element. It is possible that the judge may be called upon to answer a third question, which, however, arises only where one of the parties bases his claim or defence upon the decision of a foreign court, or, in technical language, upon a foreign judgment.

"The question which then arises and forms the third possible preliminary inquiry may be thus stated: Is the case one with which, according to the principles upheld by English courts, the foreign court delivering the judgment, had a right to deal?

"This again is a question of jurisdiction. * * *

"Each of these inquiries, be it noted, must be answered by any judge, English or foreign, in accordance with definite principles, and, by an

English judge, sitting in an English court, in accordance with principles or rules to be found in the law of England. These rules make up that department of English law that deals with the Conflict of Laws and may be provisionally described as principles of the law of England governing the extra-territorial operation of law or recognition of rights."

Dicey, Conflict of Laws, pp. 2, 3.[1]

EXTRACTS FROM SAVIGNY'S CONFLICT OF LAWS (Guthrie's Translation, 2d Ed., Revised) 68–71, 76–77: "Many have attempted to determine these questions by the principle of independent sovereignty alone, laying down the two following postulates: (1) Every state is entitled to demand that its own laws only shall be recognized within its bounds. (2) No state can require the recognition of its law beyond its bounds.

"I will not only admit the truth of these propositions, but even allow their extension to the utmost conceivable limits; yet I believe that they afford little help in the solution of our problem.

"To carry out the principle of the independent sovereignty of the state to the utmost possible extent with regard to aliens would lead to their complete exclusion from legal rights. Such a view is not strange to the international law of the Romans; and even where it was not enforced by them against foreign countries, a great distinction as to the capacity for rights was always maintained between Romans and foreigners. Modern law, on the contrary, has gradually tended towards the recognition of complete legal equality between natives and foreigners.

"But this legal equality of persons does not at all determine the question of collision between native and foreign laws. In the first place we must admit that, if the domestic laws give directions for the treatment of cases of conflict, these must be applied absolutely by the judges of our state. Nowhere, however, do such laws exist in any degree of completeness; in particular, not in the states where the German common law prevails.

"The strict right of sovereignty might certainly, among other things, go so far as to require all judges of the land to decide the cases that come before them solely according to the national law, regardless of

[1] In a country like France, where, in the absence of treaty, the enjoyment of strictly civil rights is extended to those foreigners only who, with the permission of the French government, have acquired an authorized domicile (see articles 11, 13, Civ. Code), the "Rights of Foreigners" form an additional and very important part of the Conflict of Laws. See André Weiss, Traité de droit international privé, vol. II, "Le Droit de l'Étranger."

For a fuller discussion of the nature of the subject, consult Dicey, Conflict of Laws, 1–16, and A. Pillet, Principes de droit international privé, Paris, 1903.

the perhaps different rules of some foreign law with whose territory the case in question may have come in contact. Such a rule, however, is not to be found in the legislation of any known state; and its absence is to be accounted for by the following consideration:

"The more multifarious and active the intercourse between different nations, the more will men be persuaded that it is not expedient to adhere to such a stringent rule, but rather to substitute for it the opposite principle. This has resulted from that reciprocity in dealing with cases which is so desirable, and the consequent equality in judging between natives and foreigners, which, on the whole, is dictated by the common interest of nations and of individuals. For it is the necessary consequence of this equality, in its full development, not only that in each particular state the foreigner is not postponed to the native (in which equality in the treatment of persons consists), but also that, in cases of conflict of laws, the same legal relations (cases) have to expect the same decision, whether the judgment be pronounced in this state or in that.

"The standpoint to which this consideration leads us is that of an international common law of nations having intercourse with one another; and this view has in the course of time always obtained wider recognition, under the influence of a common Christian morality, and of the real advantage which results from it to all concerned.

"In this way we come to apply to the conflict of territorial laws of independent states substantially the same principles which govern the collision of particular laws in the same state; and this co-ordination is preserved throughout the following inquiry.

"In regard to both kinds of collision, then, the question may be stated thus:

"To ascertain for every legal relation (case) that law to which, in its proper nature, it belongs or is subject.

"This equalization, as contrasted with the strict law above mentioned, may be designated a friendly concession among sovereign states; that is, an admission of statutes originally foreign among the sources from which native courts have to seek for their decision as to many cases (legal relations).

"Only this sufferance must not be regarded as the result of mere generosity or arbitrary will, which would imply that it was also uncertain and temporary. We must rather recognize in it a proper and progressive development of law, keeping pace with the treatment of cases of conflict between the particular laws of the same state. * * *

"But this principle must be limited with respect to many kinds of laws, whose peculiar nature does not admit of so free an application of the community of law obtaining between different states. Where there are such statutes, the judge will have to apply the domestic law more exclusively than that principle allows, and must, on the other hand, leave the foreign law unapplied, even where that principle would justify its application. Thence arises an important class of exceptions,

to determine the limits of which is perhaps the most difficult part of this subject. The often unconscious respect paid by writers to these exceptions has not a little contributed to hinder the unanimous recognition of the rules which are limited by them. If it were possible satisfactorily to establish and ascertain the extent of these exceptions, many disputes as to the rules themselves would be prevented or brought to an end. I will endeavor to reduce such exceptions to two classes:

"A. Laws of a strictly positive, imperative nature, which are consequently inconsistent with that freedom of application which pays no regard to the limits of particular states.

"B. Legal institutions of a foreign state, of which the existence is not at all recognized in ours, and which, therefore, have no claim to the protection of our courts."

HILTON v. GUYOT (1895) 159 U. S. 113, 163, 16 Sup. Ct. 139, 40 L. Ed. 95, Gray, J.: "International law, in its widest and most comprehensive sense—including not only questions of right between nations, governed by what has been appropriately called the 'law of nations,' but also questions arising under what is usually called 'private international law,' or the 'conflict of laws,' and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation —is part of our law, and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation between man and man, duly submitted to their determination.

"The most certain guide, no doubt, for the decision of such questions is a treaty or a statute of this country. But when, as is the case here, there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is, whenever it becomes necessary to do so, in order to determine the rights of parties to suits regularly brought before them. In doing this, the courts must obtain such aid as they can from judicial decisions, from the works of jurists and commentators, and from the acts and usages of civilized nations. Fremont v. U. S., 17 How. 542, 557, 15 L. Ed. 241; The Scotia, 14 Wall. 170, 188, 20 L. Ed. 822; Respublica v. De Longchamps, 1 Dall. (Pa.) 111, 116, 1 L. Ed. 59; Moultrie v. Hunt, 23 N. Y. 394, 396.

"No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call 'the comity

of nations.' Although the phrase has been often criticised, no satisfactory substitute has been suggested.

" 'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

"Mr. Justice Story, in his Commentaries on the Conflict of Laws, treating of the question in what department of the government of any state, in the absence of any clear declaration of the sovereign will, resides the authority to determine how far the laws of a foreign state shall have effect, and observing that this differs in different states, according to the organization of the departments of the government of each, says: 'In England and America the courts of justice have hitherto exercised the same authority in the most ample manner, and the Legislatures have in no instance (it is believed) in either country interfered to provide any positive regulations. The common law of both countries has been expanded to meet the exigencies of the times as they have arisen, and, so far as the practice of nations, or the "jus gentium privatum,' has been supposed to furnish any general principle, it has been followed out.' Story, Confl. Laws, §§ 23, 24.

"Afterwards, speaking of the difficulty of applying the positive rules laid down by the Continental jurists, he says that 'there is, indeed, great truth' in these remarks of Mr. Justice Porter, speaking for the Supreme Court of Louisiana: 'They have attempted to go too far, to define and fix that which cannot, in the nature of things, be defined and fixed. They seem to have forgotten that they wrote on a question which touched the comity of nations, and that that comity is, and ever must be, uncertain; that it must necessarily depend on a variety of circumstances which cannot be reduced to any certain rule; that no nation will suffer the laws of another to interfere with her own to the injury of her citizens; that whether they do or not must depend on the condition of the country in which the foreign law is sought to be enforced, the particular nature of her legislation, her policy, and the character of her institutions; that in the conflict of laws it must often be a matter of doubt which should prevail; and that, whenever a doubt does exist, the court which decides will prefer the laws of its own country to that of the stranger.' Story, Confl. Laws, § 28; Saul v. His Creditors, 5 Mart. (N. S.) 569, 596, 16 Am. Dec. 212.

"Again, Mr. Justice Story says: 'It has been thought by some jurists that the term "comity" is not sufficiently expressive of the obligation of nations to give effect to foreign laws when they are not prejudicial to their own rights and interests. And it has been suggested that the doctrine rests on a deeper foundation; that it is not so much a matter of comity or courtesy, as a matter of paramount moral duty. Now,

assuming that such a moral duty does exist, it is clearly one of imperfect obligation, like that of beneficence, humanity, and charity. Every nation must be the final judge for itself, not only of the nature and extent of the duty, but of the occasions on which its exercise may be justly demanded.' And, after further discussion of the matter, he concludes: 'There is, then, not only no impropriety in the use of the phrase "comity of nations," but it is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another.' Story, Confl. Laws, §§ 33–38.

"Chief Justice Taney, likewise, speaking for this court, while Mr. Justice Story was a member of it, and largely adopting his words, said: 'It is needless to enumerate here the instances in which, by the general practice of civilized countries, the laws of the one will, by the comity of nations, be recognized and executed in another, where the rights of individuals are concerned.' 'The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy, or prejudicial to its interests. But it contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong, that courts of justice have continually acted upon it as a part of the voluntary law of nations.' 'It is not the comity of the courts, but the comity of the nation, which is administered and ascertained in the same way, and guided by the same reasoning, by which all other principles of municipal law are ascertained and guided.' Bank of Augusta v. Earle, 13 Pet. 519, 589, 10 L. Ed. 274; Story, Confl. Laws, § 38.

"Mr. Wheaton says: 'All the effect which foreign laws can have in the territory of a state depends absolutely on the express or tacit consent of that state.' 'The express consent of a state to the application of foreign laws within its territory is given by acts passed by its legislative authority, or by treaties concluded with other states. Its tacit consent is manifested by the decisions of its judicial and administrative authorities, as well as by the writings of its publicists. There is no obligation recognized by legislators, public authorities, and publicists to regard foreign laws; but their application is admitted only from considerations of utility and the mutual convenience of states—"ex comitate, ob reciprocam utilitatem."' Wheat. Int. Law (8th Ed.) §§ 78, 79." [2]

[2] The Dutch jurist, J. Voet (1647–1714), is the author of this doctrine (De Statutis, § 1).

EXTRACTS FROM A. PILLET, ESSAI D' UN SYSTÈME GÉNÉRAL DE SOLUTIONS DES CONFLITS DES LOIS, 21 Clunet, 419–427, 433, 727: "Each time a question is asked concerning the international nature of a law, a doubt is possible only between two views. This law may be either territorial or extra-territorial. If it is territorial, everybody in a country is amenable to its provisions, without it being permissible to distinguish between subjects and foreigners, between persons domiciled or not domiciled, but, on the other hand, as soon as a person leaves his country, he ceases to owe it obedience. If it is extra-territorial, the contrary effects are produced. Once deemed applicable to a person (by reason of his nationality or domicile according to the view taken), the law follows him everywhere, so that its application is not determined by the place where such application is made, but by the person in question. Territoriality and extra-territoriality, these are the two poles between which oscillates the mass of undecided opinions—opinions most often devoid of definite principles capable in a given case of guiding the inquirer without hesitancy to one or the other.

"Each of these extremes has had its hour of celebrity and its hope of universal sway. For four centuries, the principle 'all customs are real' has been accepted as an article of faith, to depart from which would have been regarded as impious. Reality was the rule. It was by no means a rule without exceptions, and these exceptions varied according to the opinion or the phantasy of each person; but it was the rule. It was already the rule for Bartolus, and it was still the rule for the great magistrate whose work closes the ancient history of our science and permits us to see dimly the aurora of new times. It was the rule for Dumoulin. It was also that of Argentré. All the jurists, Italian, French, Dutch, English and German, stood equally firm on this principle. Children even did not doubt it.

"This principle was just, as long as the legal communities lived in a state of complete isolation; from the day that extra-territorial relations (international or interprovincial) arose, it could not be admitted that a person leaving his country broke at once all the legal ties which attached him to it; from that day on there began the old struggle between the traditional principle, still intact to all appearances, and the reality of things, an obtrusive reality, disavowed by principles regarded as the most certain in the law, but existing nevertheless and taking little by little its place by reason of its obviousness and necessity. The whole history of the long war between reality and personality had its origin in the contradiction which is bound to appear whenever a principle of law subsists longer than the social conditions out of which it grew and the exterior phenomena which it was to govern.

"To most of us the statutory theory appears as only a distant recollection, but in its place quite a contrary conception has arisen which,

thanks to the just authority of its inventors, thanks also to the consideration it attached to the human person, won immediately strong support.

"The school of Mancini proclaims that personality is the rule and reality the exception. The formula is seductive, indeed, and the equitable results to which it generally leads has given to it a strong-felt influence upon the legislation enacted since the day it was announced. The misfortune is that one must not try to justify it. One would not succeed, and it was only at the price of inexcusable confusion that its author himself was able to give to it for a time the appearance of reason.

"In the meantime a great number of different systems had been proposed, principally in Germany, a country the fecundity of which in this respect has been marvelous. The ones best known are those of Titius, Eichhorn, Böschen, Hauss, Schäffner, Wächter, and Savigny. Although they borrowed their determining principles from very different sources, of which we shall not try to give here even an idea, they possessed this common characteristic that they did not regard law as being either territorial or extra-territorial by nature. They refrain from laying down a single principle which they know cannot be upheld, and agree in deciding that, according to circumstances, laws are now territorial, now extra-territorial, depending, according to some, upon the intent of the legislator, according to others upon the intent of the parties, or even upon the place where the relationship arose, or, in short, upon such other particular circumstances as the author deemed wise to adopt as the pivot of his theory and as the criterion of his decisions.

"These ideas are familiar to every one who has studied Private International Law and it is enough for us to have recalled them here by means of the lightest sketch. If we should try to give a résumé in as general and abstract a formula as possible of the work accomplished by the theoretical writers on Private International Law, we should say that, among the jurists, some have maintained the principle of the territoriality of laws, others have proclaimed their personality as a general principle, others, finally, and a very large number, think that by nature laws are necessarily neither real nor personal, being susceptible of assuming the one or the other of these characteristics, according to circumstances.

"In order to complete the cycle of possible combinations, only one formula is lacking, namely, that laws are by their nature at once territorial and extra-territorial. It is precisely this formula which we take as the basis of our theory. It is the one which we submit and which we shall immediately try to justify. * * *

"The law is essentially an instrument of authority, indispensable to the social power in its relation to those composing the community whose destiny it directs. As such the law must and always does embrace certain characteristics indispensable to its effect, certain qualities

without which it would no longer have any reason to exist. It belongs to public law to unfold the complete sum of such characteristics. We shall distinguish here only two, which alone seem to us important from an international point of view, but the importance of which in this connection is very great—the continuity and generality of its application. * * *

"When we say that the law is naturally continuous, we mean that its authority should be exercised without interruption. From the day it is enacted to the day it is abrogated a law must be followed and obeyed without interruption. It constitutes in its very essence an act of authority, command or prohibition imposed upon the will of the persons to whom it applies and who must submit to its sway. If the law operated only at intervals, if its authority had to suffer periods of enervation and paralysis, it would be better not to burden the statute books with a useless text. What would a law be which one must obey one day and can violate the next? A veritable phantom of command, it would but reveal the radical powerlessness of the legislator, careless enough of his authority to permit such an abuse The authority of a law must therefore be continuous. The fact is so evident that we deem it useless to insist upon it longer.

"It is not less necessary that each law be general in its subjective application; that is, with respect to the persons comprised within the social group for which it has been made. Let us make this point clearer. We do not mean to say, of course, that all laws are necessarily made for all citizens without exception. It is clear that the laws regarding the condition of minors have nothing to do with those regarding persons of age and that laws regulating the status of married women do not apply to either girls or widows. We mean that when a law is made for a certain category of persons, it must apply to all who, being embraced within such category, are found within the territory of the legislator who has enacted it. In this consists what we may call the subjective generality of a law, and the reason for this characteristic is this. The benefit of the law consists not only in that it adapts to the interests of each one the rule deemed by the legislator best calculated to further them, but also in that it establishes among the members of the community a certain order, an order precious from a double point of view: First, for its own sake because it simplifies the relations between citizens; then because it permits the legislator to insure a complete respect for those ideas of social morality deemed necessary by him throughout the extent of the domain subject to his authority. Here again it is obvious that no order can exist except upon the condition that one and the same law is binding upon all persons present within the territory, within the limits of which it is to be established. History has transmitted to us the remembrance of an epoch during which each person within the same territory followed his personal law, where one could see converse together, according to the testimony of Agobard, five persons subject

to five different laws, and we know the confusion which was the result of this state of affairs and which drove the following period into quite the opposite extreme. Evidently order is necessary for each state, and order exists in the domain of law only as long as law applies without distinction to every person within the confines of the state.

"We have argued so far independently of an international point of view. Let us apply our reasoning now to the situation created by the existence of an international society. International relations have this consequence that each state has constantly within its midst a certain number of foreigners; there is a reciprocal penetration of one nation by another. What is to be the role played by the law in the face of such a phenomenon?

"This point appears certain, namely, that the international manifestations of individual activity should not remain outside of the domain of law (droit) and consequently outside of that of the law (loi). It is necessary that the law (there is no need of determining this law as yet) be applicable to them, direct them, comprise them, play with respect to them the same role it is accustomed to play in its purely national relations. The more completely this object is attained, the more international society will gain in stability, security, and usefulness for those forming part of it. The ideal in this matter would be that the law in this new function would preserve that fullness of effect which it possesses in the purely national order. We shall soon see whether this ideal is such that we can ever hope to realize it fully.

"The aim should therefore be to preserve for the law, in its international function, the characteristics it possesses in its national function, for we have seen that upon the maintenance of these characteristics depends the certainty of its effect. Let us study then these characteristics from an international point of view and let us see the consequences which they entail with respect to the effect of the law in this domain. From an international point of view, continuity implies necessarily extra-territoriality; subjective generality implies territoriality. This double connection is easily seen. For a law to be truly continuous, it is necessary that it be applicable under all circumstances to the person within the purview of its provisions, that it follow him abroad when he leaves the country, that it govern the interests he may possess there, as well as those he may possess at home. Each infraction of this rule would constitute a total or partial gap in the application of law, and a defect therefore which would compromise its effect always seriously, sometimes irremediably. Take the common example of a rule of law concerning capacity and suppose that it ceases to apply to a person when he leaves the country, or only that it remains powerless with regard to the property of such a person situated abroad, and it will be perceived that in both cases the rule fails to attain its object because it lacks continuity in its effect. The legal régime to which a person is subject is, in the case of interruption,

replaced by a different régime conceived in a different spirit, containing dispositions foreign and perhaps contrary to those of his own country; dispositions which by reason of their intermittent applications will often be little superior to a total absence of any legal regulation. It is clear, for example, that if, with respect to the same person, a period of capacity, though it be limited, be followed by a period of complete incapacity, all the effects which the legislator could expect from the measure taken in his behalf will be forever frustrated by the lack of continuity in the application of such measure. We may say that this quality, which in municipal law is called 'continuity,' is in international law called 'extra-territoriality.' The two words represent the same idea and form part of the nature of law by virtue of the same title.

"In the same way subjective generality cannot exist without territoriality. We have seen that generality is required as a condition for the existence of order in the private relations of citizens. Now, this order can exist only upon the condition that it governs all the elements scattered over the territory where it is to be established. We are in the habit of making use of a comparison here which we take the liberty of reproducing. When in a military parade a certain order is to be observed, the failure of one man to remain in the place assigned to him is sufficient to destroy that order. Order has something indivisible about it. It exists or it does not exist, but it cannot exist in part. The figure I draw upon paper may be square or not square, but it cannot be so in part. So it is in the juridical world. An order which the law aims to establish will exist only if all of the subjects found within the society which is to benefit from it are equally subject to its dispositions. No distinction is possible, all persons must submit to it without distinction whether foreigners or subjects, all property must be subject to it without regard to its owner, all juridical acts comply therewith, wherever the place may be in which they are intended to produce their effect. In a word, the law must be strictly territorial.

"This long demonstration is now concluded and those who have had the patience to follow us will conclude with us that all laws are by their nature both territorial and extra-territorial since the generality and continuity of application are among their essential characteristics. This truth may have a paradoxical aspect, but it is none the less the pure truth.

"Here then is the first result obtained, and it is very important. Without proceeding further, the discovery we have just made will enable us to understand a fact which without it may be difficult to explain, namely, that the laws most obviously territorial operate sometimes as extra-territorial laws, and, conversely, that those whose extra-territorial character is least disputed do not fail, under certain circumstances, to produce territorial effects. * * *

"If they ordinarily present to us only one of these aspects, which is

always the same, it results solely from the necessity one is under to make some concessions in order to arrive at a solution of the conflicts.

"The social aim to be attained is the reason for the existence of the law. It gives to it its distinctive character. It assigns to it its duration. Is it not logical, therefore, to maintain that the international effect of law should be determined by its social aim? This is, indeed, the rule which we propose. We know that laws are by their nature both territorial and extra-territorial, that in international commerce they can retain only the one or the other of these characteristics, and we believe that in each case the choice of this characteristic should be determined by a consideration of the social aim of the law. We declare territorial all laws whose purpose would not be attained if in each country they were not applicable to foreigners and to subjects alike, extra-territorial those whose purpose demands that they follow everywhere the person falling within the purview of its dispositions. In all cases, therefore, we shall consult the social purpose of each law submitted to our examination. This will be for us the only key to the question of conflicts, the formula from which we shall seek an answer to the question whether a law should be considered territorial or extra-territorial." [3]

[3] For a fuller development of Pillet's theory, consult 21 Clunet, 417-435, 711-754; 22 Clunet, 241-259, 500-517, 929-952; 23 Clunet, 5-30; also his Principes de droit international privé, 1903.

A summary of the principal theories advanced by continental jurists concerning the Conflict of Laws may be found in v. Bar, Theory and Practice of Private International Law (Gillespie's Transl. 2d Ed.) 11-77; F. Meili (Kuhn's Transl.) International Civil and Commercial Law, 52-100; and A. Weiss, Traité de droit international privé, vol. III, 7-243. See, also, F. Kahn, Abhandlungen aus dem internationalen Privatrecht, 39 Ihering's Jahrbücher für die Dogmatik des bürgerlichen Rechts, 1-112; 40 Id. 1-87; D. J. Jitta, Le droit commun international comme source du droit international privé, 4 Darras, 553-570.

The earliest theory—the statute theory—was formulated by the early Italian school, whose chief representative was Bartolus, 1314-1357. The Italian was followed by the French school, of which Argentræus (D' Argentré), 1519-1590, and Molinæus (Dumoulin), 1500-1566, were the leaders, and the Dutch school, to which, among others, Burgundus, 1586-1649, Rodenburg, 1618-1668, P. Voet, 1619-1677, J. Voet, 1647-1714, and Ulricus Huber, 1636-1694, belonged.

Speaking of the influence of the Dutch jurists upon English and American law, Meili (supra, 83, 84) says: "Foreign law gradually found an introduction through the practice of the ecclesiastical courts and writs of admiralty, a result which was assisted by the fact that many English and Scotch jurists completed their education in Holland. Another important element was the fact that William III (1650-1702) simultaneously held the positions of king of England and stadtholder of Holland. The Dutch school exercised a great influence in England, and, through English authorities, later also in America. As the American author Story (section 10) well says, we have no early theoretical discussions from England. We may add that England never underwent the early continental European development of the statutory conflict at all. With the growth of the science of International Private Law, this nation took the doctrines as they had been developed by the Dutch school. Story, himself, was largely influenced by Ulricus Huber." See, also, Westlake, Priv. Int. Law, 8.

For an account of the history of the statute theory, see the authoritative work of A. Lainé, Introduction au droit international privé. See, also, F.

MARSHALL v. SHERMAN (1895) 148 N. Y. 9, 24, 42 N. E. 419, 423, 34 L. R. A. 757, 51 Am. St. Rep. 654, O'Brien, J.: "It is a principle of universal application, recognized in all civilized states, that the statutes of one state have, ex proprio vigore, no force or effect in another. The enforcement in our courts of some positive law or regulation of another state depends upon our own express or tacit consent. The consent is given only by virtue of the adoption of the doctrine of comity as part of our municipal law. That doctrine has many limitations and qualifications, and generally each sovereignty has the right to determine for itself its true scope and extent. The courts of this state are open to all suitors to enforce rights of action, transitory in their nature, recognized by the common law, or founded in natural justice, and when no law of the forum or any principle of public policy interferes. There is, however, a large class of foreign laws and statutes which, under the doctrine of comity, have no force in this jurisdiction. It belongs exclusively to each sovereignty to determine for itself whether it can enforce a foreign law without, at the same time, neglecting the duty that it owes to its own citizens or subjects. It has been held, and is a principle universally recognized, that the revenue laws of one country have no force in another. The exemption laws and laws relating to married women, as well as the local statute of frauds and statutes authorizing distress and sale for nonpayment of rent, are not recognized in another jurisdiction under the principles of comity. Morgan v. Neville, 74 Pa. 52; Waldron v. Ritchings, 3 Daly, 288; Siegel v. Robinson, 56 Pa. 19, 93 Am. Dec. 775; Kelly v. Davenport, 1 Browne (Pa.) 231; Ross v. Wigg, 34 Hun, 192; Ludlow v. Van Rensselaer, 1 Johns. 95; Skinner v. Tinker, 34 Barb. 333. It is well understood, also, that the statutes of one state giving a right of action to recover a penalty have no force in another. Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123. So, also, rights of action arising under foreign bankrupt, insolvent, or assignment laws are not recognized here when prejudicial to the interests of our own citizens. Warner v. Jaffray, 96 N. Y. 248, 48 Am. Rep. 616; In re Waite, 99 N. Y. 433, 2 N. E. 440; Barth v. Backus, 140 N. Y. 230, 35 N. E. 425, 23 L. R. A. 47, 37 Am. St. Rep. 545; Douglass v. Phœnix Ins. Co., 138 N. Y. 209, 33 N. E. 938, 20 L. R. A. 118, 34 Am. St. Rep. 448. There is another class of cases where the right to enforce the foreign statute is conditioned upon the existence of a law substantially similar here. Wooden v. Western N. Y. & P. R. Co., 126 N. Y. 10, 26 N. E. 1050, 13 L. R. A. 458, 22 Am. St. Rep. 803. Statutes giving a right of action for negligence resulting in death belong to that class. Whitford v. Panama R. Co.,

Meili, Die theoretischen Abhandlungen von Bartolus und Baldus über das internationale Privat- und Strafrecht, 4 Niemeyer, 258–269, 340–346, 446–473; and F. Meili, Argentræus und Molinæus und ihre Bedeutung im internationalen Privat- und Strafrecht, 5 Niemeyer, 363–380, 452–472, 554–566.

23 N. Y. 465. There are many other classes of foreign statutes affecting public and private interests which courts have uniformly held can have no extraterritorial force or effect."[4]

EXTRACTS FROM A. S. DE BUSTAMANTE, TRATADO DE DERECHO INTERNACIONAL PRIVADO, Habana, 1896, 455–456: "It is a recognized fact that the laws emanating from each sovereignty are normally applicable within its territorial limits. That states have no means of securing or imposing the observation and respect of their laws in foreign countries is also correct. But the author, who accepts the premises, finds, when it is asserted that a nation has the right to impose all of its laws upon all persons residing within its territory and is in no way bound to permit the application of foreign law, that exaggerated and false deductions are made therefrom. Moreover, the system of absolute territoriality, instead of settling conflicts, simply renders their existence impossible and, by modifying the capacity of persons according to the place where they may happen to be, fails to recognize that all laws are not enacted for foreigners and to that extent cannot be applicable to them.

"Of comity it has been said that in theory it is a simple manifestation of the doctrine of interest, and that in practice, instead of uniting, it isolates and separates, nations; that it confounds two things so distinct as the actual power and the duty of a state; that it implies a negation of the latter; that, in view of the different ways in which it may be interpreted, it will never be able to put into relief the law

[4] "No attempt to define the limits of that reservation (public policy) has ever succeeded, even to the extent of making its nature clearer than by saying that it exists in favor of any stringent domestic policy, and that it is for the law of each country, whether speaking by the mouth of its Legislature or by that of its judges, to determine what parts of its policy are stringent enough to require its being invoked."—Westlake, Priv. Int. Law, 53.

CONTINENTAL LAW.—On the continent foreign law will yield to the local law whenever its enforcement is deemed contrary to its rules concerning public order. *France*, article 6, Civ. Code. *Italy*, article 12, Prel. Disp. Civ. Code. *Germany*, article 30, Law Intr. Civ. Code, providing: "The application of a foreign law is excluded, if it would be repugnant to good morals (gute Sitten) or to the object of a German law."

In order to distinguish such rules from rules of municipal law applicable only to transactions taking place within the jurisdiction, it is customary to call the former rules concerning "international public order."

See, also, A. de Bustamante, El orden publico, Havana, 1893; R. Boissarie, De la notion de l'ordre public en droit international privé, Paris, 1888; F. Despagnet, L'ordre public en droit international privé, 16 Clunet, 5–21; P. Fedozzi, Quelques considérations sur l'idée d'ordre public international, 24 Clunet, 69–78, 495–507; P. Fiore, De la limitation de l'autorité des lois étrangères et de la détermination des lois d'ordre public, 35 Clunet, 351–366; F. Kahn, Die Lehre vom Ordre Public, 39 Ihering's Jahrbücher für die Dogmatik des bürgerlichen Rechts, 4–112; P. Klein, Zur Auslegung des Art. 30 des E. G. zum deutschen B. G. B., 14 Niemeyer, 146–151; P. Klein, Die Lehre vom Ordre Public, 29 Archiv für bürgerliches Recht, 311–384.

applicable to each case and does not establish a criterion for the choice of law between the different foreign systems. * * *

"If nations lived isolated one from the other, and in a state of constant and interminable enmity, the correctness of the first ground upon which the doctrine of the North American and English writers is based would have to be admitted. But since peace is the habitual state in international relations, making of the civilized peoples a large voluntary association, whose ties and necessities are increasing every day, law itself cannot hold aloof from the exchange of products, customs and institutions, which is the basis and source of the cosmopolitanism of our time. When everything passes the frontiers lawfully, law itself should not be confined within the limits of the state enacting it, and thus become an insurpassable obstacle to this very exchange of men, things and ideas which characterizes modern civilization. But we shall see hereafter, and in the preliminary chapters we have already seen, how Private International Law finds its solid basis in the international community, which, at the same time guarantees the independence of each state and imposes the application of foreign law to certain juridical relationships. The sovereignty of a state, correctly understood, is not injured by this, although it would be necessary to deprive it of some of the attributes with which the adherents of the statute school of jurists clothed it and with which Anglo-American writers pretend to adorn it still.

"Comity is a pretext for the evasion of the consequences of a strictly territorial law. After the notion of such a law is denied, it would be idle to combat it, for it becomes unnecessary. But it may not be amiss to observe that in its obscured and little defined concept, interest, courtesy and reciprocity, ideas so important for the history of law, play a part. In another place we have dealt with these ideas, giving our opinion with respect thereto. The name of science cannot be given to them, nor can a practical and useful system be based upon them. They authorize simply concessions ungoverned by rule, the supposed independence of a state consisting in an adjustment of its conduct to that followed by other states, resulting ultimately in a real isolation between the people of the different countries, and in making of courtesy and reciprocity a system of reprisal, instead of a furtherance of juridical relations."

WABASH R. CO. v. HASSETT (Ind. 1908) 83 N. E. 705, 708. Montgomery, J.: "Appellant's learned counsel insist, however, that this suit cannot be maintained in Indiana, because the statute of Illinois, creating the right of action, provides 'that no action shall be brought or prosecuted in this state to recover damages for a death occurring outside of the state.' It is argued that jurisdiction of a cause of action arising under the statute of one state is sustained by the courts

of another only upon the ground of comity or reciprocity, and, since the courts of Illinois cannot entertain a similar cause of action arising under the statute of this state, the requisite reciprocity is wanting and jurisdiction of our courts over this action must fail. The cases cited which seemingly support this doctrine are: Baltimore & O. R. Co. v. Chambers, 73 Ohio St. 16, 76 N. E. 91, 11 L. R. A. (N. S.) 1012; Wabash R. Co. v. Fox, 64 Ohio St. 133, 59 N. E. 888, 83 Am. St. Rep. 739. These Ohio decisions were based upon a statute permitting actions for wrongful death occasioned in another state to be enforced in that state only where such other state allowed the statutes of Ohio of a like character to be enforced in its courts. The reciprocity policy of Ohio was thus embodied in a positive statute. The English rule is to the same effect. 22 Am. & Eng. Ency. of Law, 1379. The doctrine of reciprocity is a fair and reasonable principle to govern the conduct of independent nations in affording relief to aliens through their courts. The people of the United States comprise one nation, banded together, among other reasons, to 'establish justice' and 'to promote the general welfare.' Each state may undoubtedly limit the jurisdiction of its courts and formulate its local policy; but, in the absence of a state policy declared and restricted by statute, the rule contended for is too narrow and illiberal to meet our approval. The statutes of a state have no extraterritorial force, but they are effective within the state enacting them, and, if they create a valid right of action there, such liability may be recognized and enforced elsewhere upon proper complaint and proof. Civil rights, whether founded upon statutes or the common law, are not local, and actions to recover damages for the violation of such rights are transitory, and not confined to the state where the cause of action accrued. The circuit courts of this state are courts of general jurisdiction, and unquestionably have jurisdiction over the subject-matter of transitory actions. The jurisdiction or power of the court to afford a remedy for a legal liability is not dependent upon the question whether the right to be enforced is of statutory or of common-law origin. If a liability has been incurred, and a right of action therefor has accrued, such action may ordinarily be prosecuted in any court which has jurisdiction of such matters and can obtain jurisdiction over the parties. If the Legislature, as it might have done, had spoken against the enforcement of foreign causes of action like this, the courts would readily obey its mandate. The policy of Illinois in this respect is embodied in a prohibitory statute. Conditions may exist within that state, which do not obtain here, making such policy expedient. The right of action herein asserted is founded wholly upon the statute of Illinois, and in nowise upon that of this state relating to the same subject. Our statute is important only as it manifests the general policy of this state toward such legislation; and the circumstance that the courts of Illinois are not permitted to entertain a suit, based upon a foreign statute to recover damages for death by wrongful act, cannot affect the jurisdic-

tion of our courts, or control the policy of this state, and of itself will not impel our courts to adopt retaliatory procedure. The failure and injustice of the common law to afford redress for a negligent injury resulting in death is recognized by the enactment of our statute creating a right of action for the benefit of the widow and next of kin. The policy of Indiana, so far as outlined or expressed by the Legislature, is favorable to remedial legislation of this character. If a legal liability exists, a justice-loving people should be inclined to afford a remedy within their power, and we find nothing, either upon the ground of adverse interests or public policy, to preclude the courts of this state from entertaining jurisdiction of this action. In reaching this conclusion we approve the modern and generally accepted doctrine that to justify our courts in refusing to enforce a right of action accruing under the laws of another state as against the policy of this state the prosecution of such action must appear to be against good morals or natural justice, or prejudicial to the general interests of the citizens of this state."

COLLIER v. RIVAZ.[5]

(Prerogative Court of Canterbury, 1841. 2 Curt. Ecc. 855.)

Sir HERBERT JENNER. This is a question with respect to certain testamentary papers of Mr. Philip Ryan, who died at Brussels in 1829. He left behind him two nieces, Mary Ryan and Mrs. Langebear, a widow, who would have been entitled to his personal estate in case he had died intestate. He left property to the amount of about £20,000. In September, 1824, he executed a will, of which he appointed Mr. V. F. Rivaz, Mary Ryan, and A. H. Rivaz, executors, and his niece, Mary Ryan, residuary legatee; he also left behind him six codicils, four of which are opposed, upon the ground that they are not executed according to the forms of the law of Belgium, in which country, it was contended, that the deceased was domiciled at the time of his death. [After finding that the testator was domiciled at Brussels, at the time of his death the learned justice continued as follows:]

The question however remains to be determined, whether these codicils which are opposed are executed in such a form as would entitle them to the sanction of the court which has to pronounce on the validity of testamentary dispositions in Belgium, in the circumstances under which they have been executed. Because it does not follow, that Mr. Ryan, being a domiciled subject of Belgium, he is therefore necessarily subject to all the forms which the law of Belgium

[5] This case, as well as the two succeeding cases, involves what is generally known as the "renvoi" doctrine or theory (in German, "Rückverweisung" and "Weiterverweisung").

requires from its own native-born subjects. I apprehend there can be no doubt that every nation has a right to say under what circumstances it will permit a disposition, or contracts of whatever nature they may be, to be entered into by persons who are not native born, but who have become subjects from continued residence; that is, foreigners who come to reside under certain circumstances without obtaining from certain authorities those full rights which are necessary to constitute an actual Belgian subject. Every nation has a right to say how far the general law shall apply to its own born subjects, and the subjects of another country; and the court sitting here to determine it, must consider itself sitting in Belgium under the particular circumstances of the case.

Now three witnesses have been examined with respect to the law of Belgium, as applying as well to the acquiring of a domicile in Belgium as to the law with respect to the execution of testamentary instruments.

With respect to domicile acquired, it is quite clear, according to the evidence of these persons, that no domicile according to the law of Belgium can be acquired unless the authority of the ruling powers is obtained to authorize the persons who apply for that authority to continue in that country; that unless that authority is obtained he is liable to be removed at any time; that having obtained that authority he then becomes to all intents and purposes a subject of Belgium, and has a right to remain there and enjoy the privileges of a natural-born subject. But it may be a different question, whether a person who has not obtained that authority, a mere resident there, is to be considered as a foreigner simply having a residence and not a domicile. I think it is very doubtful whether the Dutch and Belgian lawyers understand the same thing—from the evidence given with respect to domicile—whether they do not consider that a person to become domiciled, must have denization, that which is equivalent to our naturalization, and they do not mean simply domicile for the purpose of succession or anything of that description, but they consider that a person in order to become domiciled must place himself by the authority of the government in the same situation as a Belgian subject, and have the rights and privileges of that country. But I think it is not necessary to inquire into this, because I think we have the conclusive evidence of two witnesses as to that which is necessary to give validity to the testamentary dispositions of persons who reside there, but have not acquired all the rights of Belgian subjects. [The learned justice here recited the testimony of the witnesses and continued as follows:]

Then according to the opinion of these gentlemen, well skilled in the practical application of the Code Napoléon and its dispositions, and which was the law in force in Belgium up to the year 1830, when the separation of the two countries took place, and consequently at the time at which these testamentary documents of Mr. Ryan were executed, they do not consider that Mr. Ryan, as a foreigner, was

bound by the requisites of the law of Belgium, as to the form and execution of a will, as would necessarily be the case with a free, natural-born subject of Belgium; but the successions of persons who, however long they might have been resident, not having obtained the royal authority to reside there, being considered as mere foreigners, would be governed by the laws of their own country, and would be upheld by the courts of Belgium, if those courts were called on to decide. The court sitting here decides from the evidence of persons skilled in that law, and decides as it would if sitting in Belgium.

Therefore I am of opinion, that notwithstanding the domicile of Mr. Ryan must be considered to have been in Belgium, and that he had in point of law abandoned his original domicile, and had acquired animo et facto a domicile in a foreign country, yet that foreign country in which he was so domiciled would uphold his testamentary disposition, if executed according to the forms required by his own country. I am therefore of opinion, that I am bound to decree probate of the will and all the codicils. And I decree the costs of all parties to be paid out of the estate.[6]

BREMER v. FREEMAN.

(Privy Council, 1857. 10 Moo. P. C. 306.)

An Englishwoman resided uninterruptedly in France for a period of fifteen years without any business or occupation in that country; renting apartments upon lease, and making declarations never to return to England; providing, moreover, a vault in the cemetery of Pére La Chaise in Paris, where she expressed her wish to be buried. In 1842 she made a will in Paris in the English form, executed according to the wills act (St. 1 Vict. c. 26), but not in accordance with the requirements of the French law. By this will she bequeathed personal property, the bulk of which was in English funds, to parties resident in England. The deceased at the time of the making of the will and at her death was not naturalized in France, nor had she obtained any authorization as required by the thirteenth article of the Code Napoléon.[7]

Lord WENSLEYDALE.[8] * * * The onus of proving that an instrument is the will of the alleged testator lies on the party propounding it. The respondent has undoubtedly established a prima facie case

[6] Accord: In re Brown-Séquard, 70 Law T. Rep. (N. S.) 811 (1894).

[7] This brief statement of facts, which has been taken from the headnote, has been substituted for that of the original report.

[8] A part of the opinion has been omitted.

by the evidence he has adduced of the due execution of the will. The onus probandi, then, lies upon the party impeaching the will, to show that it ought not to be admitted to proof.

The appellant alleges that the supposed testatrix was at the time of her death (for that is the material date) domiciled elsewhere than in England. The burden of proof of that fact unquestionably rests upon her. She must establish that the alleged testatrix had lost her domicile in England; and if it is proved that she abandoned it and gained another elsewhere, and died in that new domicile, the onus probandi is then shifted, and it lies upon the party propounding the will to prove that the law of that domicile was such as to authorize a will in that form. If he fails in that proof the will propounded cannot be admitted to probate.

That the law of the testator's domicile at the time of making the will, and of the death of the testator, when there is no intermediate change of domicile, must govern the form and solemnities of the instrument, can no longer be questioned. * * *

Two questions, therefore, are to be disposed of in this case:

First. Has the appellant proved satisfactorily that the deceased, Madame Calcraft, or Allegri, died domiciled in Italy, or in France, where the appellant alleges that she was actually then domiciled?

Secondly. Has the respondent established, to the satisfaction of their lordships, that by the municipal law of the domicile at the time of death the will propounded was valid?

We proceed to consider these questions in their order.

[His lordship considered here the evidence as to domicile and continued as follows:]

On the whole, their lordships entirely concur with the learned judge in his opinion that the deceased was domiciled, according to the law of nations, at Paris, both at the time of her death and the time of making her will, if that is at all material; and we think it is not.

This domicile being established in evidence, the burden is thrown on the respondent to prove that the will, in the English form, is sanctioned by the municipal law of France. He must show, upon the balance of the conflicting evidence in the cause, that the wills of persons, so domiciled, in that form, are allowed by that law.

This is the important question, and the only one of any difficulty in the case.

Much evidence was produced of the law of France on both sides; the viva voce testimony of experts in the science and practice of the law, vouching and referring to the Code Napoléon decrees, and to known treatises. Some of those last have been since brought forward and referred to without objection on either side, and their lordships have to decide on the whole of this (for the most part) very unsatisfactory, confused, and conflicting evidence, whether they are convinced that this will, executed in France in the English form, is valid.

On the part of the respondent, five persons practicing in the French

courts, stating themselves to be experienced in the law of France, were examined; on the part of the appellant, three. It is to be lamented that from the very nature of the case we cannot satisfy ourselves by the personal examinations of those witnesses as to the weight due to each of them, and a proper sense of professional delicacy precludes them from giving evidence as to the merits of each other. We are compelled, therefore, to decide the disputed question with inadequate means of judging of their professional eminence, their skill, and knowledge. It is to be remarked, speaking with all respect to those gentlemen, that the rule of international law which all English lawyers consider as now firmly established, namely, that the form and solemnities of the testament must be governed by the law of the domicile of the deceased, does not appear to be recognized, or at least borne in mind, by any of them. Nay, in Quartin's Case, both the Cour Royale and the Cour de Cassation, expressly decided that the will must be in the form and with the solemnities of the place where it is made, on the principle that "locus regit actum"; an error which is ably exposed in the opinion of M. Target in the Duchess of Kingston's Case (Coll. Jur. p. 323). The three witnesses called for the appellant, Messrs. Frignet, Senard, and Paillet, all maintain the same doctrine.

If this position were really true, the case of the appellant would prevail, but the other witnesses do not maintain the same doctrine. Of the five experts examined for the respondent, three, Messrs. Blanchet, Hebert, De Vatismesnil, all think that the will, either in the form required by the law of the domicile of origin, or the place where the party dwells, is valid; a position which, by English lawyers, is certainly now considered to be exploded since the case of Stanley v. Bernes.

The whole of these five experts give their opinion that the deceased never was domiciled de facto, according to the law of nations, in France, upon the facts stated in the case. In that respect their lordships have already intimated that they entertain a contrary opinion, and that circumstance, although it is quite consistent with their being right in their opinion of the law, a little diminishes the reliance to be put upon it.

These five witnesses all say, some less decidedly than others, that to gain a legal domicile in France the authorization of the Emperor was necessary. Some admit that there are contrary dicta and decisions. The other three experts, those examined on behalf of the appellant, give their opinion that to acquire a legal domicile, such as will cause the succession to open in France, the imperial authorization is not necessary (Frignet, Senard, and Paillet), but most of these experts also admit that it is a disputed question.

This difference between the learned experts arises upon the construction of the thirteenth article of the Code Napoléon, upon which we can form some opinion ourselves. It is to this effect: "The foreigner who shall have been admitted by authorization of the Emper-

or to establish his domicile in France, shall enjoy there all civil rights, so long as he shall continue to reside there." It is said that the rights of testacy and succession are civil rights, and that a domiciled foreigner cannot enjoy those rights without this authorization. Pothier, in his treatise "De la Communauté," pt. I, c. 1, art. 1, classes the right of testacy and succession among civil rights, which strangers have thought not to include domicile, and contracts among the "droits des gens," which strangers have thought to be included; and in his "Traité des Testaments," c. 3, § 1, art. 1, p. 309, he says: "Le testament appartient au droit civil, d'où il suit qu'il n'y a que ceux qui jouissent des droits de citoyens qui puissent tester," and, therefore, "aubains" are strangers not naturalized, are regularly incapable of bequeathing the goods they have in France.

The affirmative provision that every foreigner who shall be authorized to fix his domicile in France shall have all the civil rights, though it does not explicitly say so, no doubt means that the foreigner, to enjoy all, must have that authorization; but it does not follow from that provision alone that he cannot enjoy any one or more of those rights without it; he may quite consistently with that article have the power of testacy and the power of leaving his succession to devolve on his family.

But assuming that the thirteenth article prohibits the exercise of any civil right to one who is domiciled, but has not an authorization from the Emperor, and, therefore, denies the right of testacy altogether, what is the consequence? Is it that the foreigner cannot make any will at all of his personal goods, wherever situated, or only of his personal goods situated in France?

If the former is to be considered as the true construction, then the consequence is that a stranger, if he elects to domicile himself in, and dies in, France without authorization, loses his power of making a will altogether, and his effects by the law of nations will not pass under his will, according to the rule already stated. What rights his relatives would have is another question.

If he should be domiciled in a country where, on death, by law all his effects go to the sovereign by a "droit d'aubaine," more extensive than that of old France, which applied only to personal effects within the kingdom, that law must prevail, and his will would be of no validity, and his relatives, by the law of his domicile of origin, would lose all their rights. In this view of the thirteenth article, this will cannot be admitted to probate.

If the meaning is, as seems probable (see Merlin, Rep. de Jur. art. "Etranger," § 11, Ed. 1812), that he shall have no power unless so authorized, to make a will of personal effects situate in France, but he may for those elsewhere, still his will, to have any effect, must be in the form and with the solemnities of his domicile, according to the general rule, otherwise it cannot be admitted to proof, and the property in France would not pass by it. So that upon any construction

of this article, on the assumption that the power of making a will is one of the civil rights on which it operates, the will in question is not valid.

There seems strong ground to contend that the restraint upon the power of testacy, and of the right of devolving personal effects upon relatives, is done away with altogether by subsequent legislation. By the law of the 14th of July, 1819, foreigners are entitled to succeed, and to dispose and receive in the same way as French subjects in all the extent of the kingdom. If a stranger can dispose of his personal property in France, or anywhere else by will, why should he be the less able to do it, because he is domiciled in France?

Be that as it may, if the power of testacy is still restrained by the thirteenth article of the Code Napoléon, and if the only effect of that article is, that a foreigner may be legally domiciled, but yet not enjoy the civil right of making a will, this will ought not to be admitted to proof.

But it is then contended on the part of the respondent, that by the law of France no domicile, for any purpose whatever, can be obtained there except by the previous authorization of the government. The witnesses differ on this point, and it will be proper to take a short review of the decided cases and the principal text authorities cited at the bar on both sides. * * *

On the whole, then, on a review of all this evidence of the law of France, their lordships are clearly of opinion, that it is not established, that for the purpose of having a domicile which would regulate the succession, any authorization of the Emperor was necessary; that a legal domicile for this purpose was clearly proved, and that consequently, if the testatrix had a power to make a will at all, the will in this form was invalid.

There are still two English cases to be noticed. The respondent relies on Collier v. Rivaz (2 Curteis, 855), in which Sir Herbert Jenner Fust decided that on the evidence before him an Englishman domiciled in Belgium by the law of nations, but not authorized by the government, according to the thirteenth article of the Civil Code of France, in force there, might make a will in the English form. The case was not regularly contested, which makes it of less authority. It was a mere question on the parol evidence of the Belgian law, which was very short and unsatisfactory. Their lordships have referred to the depositions, and doubt whether the learned judge was warranted by the evidence contained in them in coming to the conclusion which he did. In this case the evidence on both sides is very full, and leads to a different conclusion. On the other hand, there may be cited for the appellant the case of Anderson v. Laneuville (9 Moore, P. C. Cases, 225), where the judicial committee decided that a domicile was acquired in France, though the deceased had not complied with the thirteenth article of the Code Napoléon, and that objection was

distinctly taken (page 336). That point, however, does not appear to have been much considered.

Their lordships are of opinion that the judgment of the learned judge of the Prerogative Court was unsupported by the evidence, and will advise Her Majesty to reverse it, and recall the probate. Under all the circumstances of this case their lordships will direct the whole costs of these proceedings to be paid out of the estate.

In re JOHNSON.

(Chancery Division, 1903. 1 Ch. 821, 72 L. J. Ch. 682.)

FARWELL, J.* Mary Elizabeth Johnson, the testatrix, was born out of wedlock in Malta in 1810. Her father, Thomas Johnson, was a British subject and domiciled in England at the date of her birth. Her mother, Marianna Attard, was domiciled in Malta at her birth. They eventually married in 1815. The testatrix left Malta about 1832 or 1833. She made a will, which does not dispose of the whole of her property. She was at the date of her will, and thenceforth down to her death on December 25, 1894, domiciled in Baden. She was not, however, naturalized in Baden; and, "according to the law of Baden, the legal succession to the property of the deceased of which she has not disposed by will is governed solely by the law of the country of which the testatrix was a subject at the time of her death." This is the finding of fact in the master's certificate, and, there being no summons to vary, is binding on all parties. On these facts the master has submitted certain questions to the court, which really resolve themselves into this one question: According to what law are the rights of the persons claiming the undisposed-of personal estate of the testatrix to be determined? This personal estate consisted entirely of personal property (movables), situate partly in Germany and partly in England.

Now, the rights of the parties claiming, in an English court, movables (and there is no question in this case of leaseholds or real estate) of an intestate depend on the law of his domicile at the time of his death. It is a settled principle of English law that no one shall be without a domicile. Every one takes at birth the domicile of his father if he be legitimate, of his mother if illegitimate, and he may in later life acquire a domicile of choice. But until he does so, or if he abandons his domicile of choice, his domicile of origin remains or revives. To quote Lord Watson (13 App. Cas. 439): "Lord West-

*A part of the opinion has been omitted.

bury in Udny v. Udny, L. R. 1 H. L. Sc. 458, * * * said: 'Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time.' According to English law, the conclusion or inference is, that the man has thereby attracted to himself the municipal law of the territory in which he has voluntarily settled, so that it becomes the measure of his personal capacity, upon which his majority or minority, his succession, and testacy or intestacy must depend." But when I turn to the laws of Baden, at the death of the testatrix the municipal law of which, according to our law, the testatrix has attracted to herself, I find that the courts of Baden pay no heed to domicile—she is foreign to them in birth, and had done in her lifetime no act which their courts recognise as entitling her to be regarded as a person the succession to whose movables should be regulated by their law. According to their law, the succession to her movables was regulated by the law of the country of which she was a subject at her death.

Now, I do not understand that any one contends, and, if they did, it would be impossible for me to hold, that this results in a circulus inextricabilis, an unending reference from one court to another. In my opinion, the true view is this: The question, having arisen in an English court primarily, falls to be decided in accordance with the law administered by that court. That law distributes movables according to the domicile at the death; and, according to that law, every person must have a domicile somewhere or other, either of origin or of choice. When the court has ascertained that the domicile of origin has been displaced by a domicile of choice, distribution of movables follows the domicile of choice; but, in order to establish a new domicile of choice, the court has to be satisfied that it has been adopted animo et facto—it is essential that there should be both animus and factum. When, therefore, the law of the land said to be chosen as the new domicile disregards domicile, and declines to distribute in accordance therewith, or to treat it as of any force, there cannot have been any change of domicile de facto; and the case is accordingly remitted to this court as a case where the propositus has intended but has failed to obtain an effectual domicile of choice. No change is effectual unless the factum is proved, and the factum cannot exist in a country where the law refuses to recognize it. The result is that this court must conclude that a domicile of choice, ineffectual to create any rights and liabilities governing the distribution of movables in the country supposed to have been chosen, is for this purpose no domicile at all, and that the propositus, therefore, is left with his domicile of origin unaffected. The Baden courts would in effect have disavowed him and disclaimed jurisdiction. This appears to me to be the logical result of the application of our rules respecting domicile and to be in accordance with justice.

It is argued that the proper course is to remit the case to the Baden courts, leaving them to say what their law would do with the movables of the propositus. But the only ground on which the question is referred to them at all is by reason of our law of domicile. When they have once rejected this, they have rejected the propositus, and all claims to direct the distribution of his movables altogether—he is a mere stranger within their gates. Why, then, should this court ask their assistance when the only ground for seeking it is repudiated by them? Take the converse case. Suppose that the Baden courts were distributing the movables of an English subject whose domicile of birth was English, but who would, according to our law, have acquired a domicile of choice in Baden. They would disregard the domicile altogether, and, if they treat the question of English law as a matter of fact, as we do, on which evidence must be adduced, they would distribute the movables in accordance with the domicile of origin of the propositus exactly as I am proposing to do in the present case. If, on the other hand, they regard it as a question of their own law and not of fact, as M. Labbé appears to hold in regard to French law (see Journal du Droit International Privé, 1885, p. 5), and there is a conflict between their views and ours, I see no reason why, in distributing movables under the jurisdiction of this court, we should surrender our own law to their views of our law in order to secure uniformity. As has been well said in an American case of Hilton v. Guyot, quoted in Minor on Conflict of Laws, p. 6: "Comity is neither matter of absolute obligation nor of mere courtesy and good will. It is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws." I cannot think that I should have due regard to such rights if I were to abrogate our own ordinary rules simply for the sake of securing uniformity with the views taken of those rules by another country. If the movables of the same propositus are distributed amongst different persons, according as the court directing the distribution is in England or Baden, the reason is because the two systems of law are intrinsically different, and can only be reconciled by international treaty. Story on the Conflict of Laws, § 28, contains this apposite passage: "There is indeed great truth in the remarks which have been judicially promulgated on this subject by a learned court [the Supreme Court of Louisiana, per Porter, J., Saul v. His Creditors, 5 Mart. (N. S.) 569, 595, 596, 16 Am. Dec. 212]: 'When so many men of great talents and learning are thus found to fail in fixing certain principles, we are forced to conclude that they have failed, not from want of ability, but because the matter was not susceptible of being settled on certain principles. They have attempted to go too far, to define and fix that, which cannot, in the nature of things be defined and fixed. They seem to have forgotten that they wrote

on a question which touched the comity of nations, and that that comity is, and ever must be, uncertain; that it must necessarily depend on a variety of circumstances which cannot be reduced to any certain rule; that no nation will suffer the laws of another to interfere with her own to the injury of her citizens; that whether they do or not, must depend on the condition of the country in which the foreign law is sought to be enforced, the particular nature of her legislation, her policy, and the character of her institutions; that in the conflict of laws, it must often be a matter of doubt which should prevail; and that whenever a doubt does exist, the court which decides, will prefer the laws of its own country to that of the stranger.' "

But in the particular matter with which I have to deal I do not think that any great divergence must necessarily result. It is not for me to say how the Baden courts would interpret their rule of distributing according to nationality. I venture to think that this does not and cannot mean that they regard the propositus as an Englishman, wherever his domicile of origin may have been, but that they distribute his movables in the same way that the English courts would distribute the movables, not of any Englishman, but of the particular propositus, and would therefore necessarily have regard to his domicile of origin. This would be in accordance with the comity of nations, inasmuch as our courts defer to and regard their laws in distributing the movables of a native of Baden who has not acquired a domicile here, and would avoid the difficulties to which I shall have to refer further presently. The one case in which an unavoidable conflict arises appears to me to be that of a native subject of Baden who has acquired a domicile of choice in England. If and so far as this court distributes his movables, they would be distributed according to our law; but if and so far as the courts in Baden distributed them, they would be distributed in accordance with Baden law. I see no way to avoid this except by treaty, nor do I think that the fact that in the converse case such as is now before me we distribute our own subject's movables in accordance with our law, although he would have acquired a Baden domicile if it were possible, is any breach of international comity, inasmuch as we make this distribution, not in disregard of but in compliance with Baden law, which rejects the jurisdiction over the movables of the propositus that we offer it. Counsel have been unable to refer me to any decided case on the subject, and I have been unable to find any myself, unless the Brown-Sequard Case, referred to in the Journal du Droit International Privé, 1895, vol. XXII, p. 427, which seems to be the same case as In the Goods of Brown-Sequard (1894) 70 L. T. 811, is an authority, but that was only an ex parte application. * * *

It was urged in argument that the finding in the certificate is that, according to the law of Baden, movables are to be distributed according to the nationality of the propositus. I have already given my reasons for holding that the Baden courts would have really refused jurisdiction; but, even if this were not so, I should arrive at the same con-

clusion in a different way. When it is said that the Baden courts regard the nationality of the propositus, I apprehend that this means that they distribute according to the law of the nation to which the propositus belongs, or in other words, of which he is a subject. But the British Empire consists of a large number of states, countries, and colonies, and differs from continental nations in that it does not impose its own laws wherever its sway extends, but admits many different systems of law within its bounds. There is no one uniform law of this empire which can be taken for this purpose as the law of the nationality of the propositus. To what nationality, then, does the propositus belong, or of whom is he a subject? The only possible answer appears to me to be that he is a subject of the British Crown and that his nationality is the British Empire. But inasmuch as there is no one law of the empire to which the rule in question can refer, resort must be had to the law of England. The first proposition seems to be clear. Whether born in England, Scotland, Canada, Cape Colony, or the Channel Islands, or elsewhere within the empire, he is a natural-born subject of the crown, and, as Calvin's Case, 7 Rep. *27b, shows, the crown is one and indivisible, and cannot be severed into as many distinct kingships as there are kingdoms; and even if it could, how is it possible to determine what is a distinct kingdom? Even if India or some of our great colonies could lay some claim to be so considered, how could the Isle of Man, or, indeed, Scotland, since the Act of Union? But to admit that either of these latter must be treated as one with England would let in all the inconveniences which have been pointed out in argument, and would, moreover, create an extraordinary anomaly. I base my decision on principle and on considerations of policy and convenience. "Allegiance is the tie, or ligamen, which binds the subject to the king, in return for that protection which the king affords the subject." 1 Blackst. 354. As is said in Calvin's Case, 7 Rep. *5: "Protectio trahit subjectionem et subjectio protectionem." It is admitted that it is the same thing for this purpose to say that the propositus is the subject of X., as to say that he belongs to the nationality of X. I see no way in which the propositus can claim to belong to a separate part of the king's dominions or to a separate nationality without denying allegiance to the king as supreme over the whole empire as one empire. The point appears to me to be involved in, and to be decided by, Calvin's Case. Although there were at that time—James I's reign—two distinct kingdoms of England and Scotland, each with its own code of laws, it was resolved by the Lord Chancellor and twelve judges that there was but one allegiance to one king, and therefore that a Scottish-born subject of the king was no alien in England. To quote the resolution at page 10a of the report: "Ligeantia naturalis nullis claustris coercetur, nullis metis refrænatur, nullis finibus premitur." And consistently with this we find that when the East India Company was abolished by St. 21 & 22 Vict. c. 106, it was enacted (section 2): "India shall be governed by and in the

name of Her Majesty." So, too, the sanction, either express or implied, of the crown, is required for the validity of the acts of all colonial Legislatures. Dicey on the Law of the Constitution (3d Ed.) p. 98.

Turning from principle to policy and convenience, how is the foreign court to ascertain what law of what part of the British Empire is to apply? Foreign states are in diplomatic relation with this country as representing the whole empire. They know nothing officially of Scotland or Canada, or the colonies, still less, perhaps, of the Channel Islands or the Isle of Man. It would surely be a task of difficulty and delicacy for them to discriminate and determine judicially that Canada (for instance) or the Cape is a distinct nationality. Indeed, in some circumstances, in some states of public feeling, such a determination might come perilously near to an unfriendly act. Further, unless a novel and hitherto unheard of definition of nationality is adopted, whereby every country within the empire that has a distinct set of laws is treated as a separate nationality (an impossible course, in my opinion), the foreign court has no data to guide it in determining what is a nationality. Does it depend on area, or population, or wealth? And how is any uniformity of opinion on the point, amongst foreign courts, to be secured? Again, what nationality at his death can a court which ignores domicile attribute to a man born in Scotland who makes his home and fortune at the Cape and dies in England? These are practical difficulties which appear to me overwhelming. Further, the object aimed at would not be attained, at any rate, in the very case put forward in argument—namely, of Scotland. It was said to be hard on a Scotchman that his estate should be dealt with under English law. But whatever might be said of some of the colonies, I fail to see how any court could hold that Scotland is a distinct nationality in the face of the Act of Union (St. 6 Anne, c. 11, § 1): "That the two kingdoms of England and Scotland shall be upon the first day of May, 1707, and for ever after be united into one kingdom." So the Isle of Man, though retaining its own laws, was purchased in the reign of George III, and by St. 5 Geo. III, c. 26, was inalienably vested in His Majesty and his heirs and successors. Indeed, I incline to think that the only part of the British Empire which could with any plausibility claim to be regarded as a separate nationality if allegiance to the crown would permit it—is the Channel Islands, being part and parcel of the Duchy of Normandy and described in Calvin's Case as "no parcel of the realm of England but several dominions enjoyed by several titles governed by several laws." The only possible solution appears to me to be that foreign courts must necessarily refer such questions as these to and decide them according to the law of the country with which alone they are in diplomatic relation; and inasmuch as the law of England distributes such movables in accordance with domicile of origin substantial justice is done to all His Majesty's subjects, and the born Scotchman will not, any more than the Cape of

Good Hope colonist or Jerseyman, be deemed to have become an Englishman or to have given up that domicile of origin with its attendant laws, to which, according to counsel's argument, he is so deeply attached, although in the particular case he had done all that in him lay to change it for another. I conclude, therefore, that distribution according to the law of the nationality means according to English law, but according to that law as applicable to the particular propositus, and not to Englishmen generally without regard to their domicile of origin. The testatrix in this case is found by the certificate to have been born a subject of the British Crown and to have had her domicile of origin in Malta. Her movables, therefore, will be distributed amongst the persons who would be entitled thereto according to Maltese law.[10]

[10] Accord: In re Bowes, 22 T. L. R. 711 (Ch. D. 1906). See Harral v. Harral, 39 N. J. Eq. 279, 51 Am. Rep. 17 (1884).

Continental Law.—The "renvoi" doctrine has been applied frequently in France since the Forgo Case (Cass. June 24, 1878, D. 1879, 1, 56). See Cass. Feb. 22, 1882 (S. 1882, 1, 393), and note by J. E. Labbé; App. Toulouse, May 22, 1880 (D. 1881, 2, 93); App. Douai, Feb. 2, 1899 (26 Clunet, 825); App. Aix, July 19, 1906 (34 Clunet, 152). It has been rejected in recent years in a number of decisions by the lower courts. See App. Paris, Aug. 1, 1905. (D. 1906, 2, 169); App. Rouen, June 30, 1897 (2 Darras, 511); Trib. Civ. Seine, Feb. 10, 1893 (20 Clunet, 530); App. Pau, June 11, 1906 (D. 1907, 2, 1), and note by A. Colin.

It has obtained no foothold in Italy. Cass. Rome, Jan. 5, 1906, and Rome, Dec. 1, 1906 (34 Clunet, 1205).

In Germany it has been recognized expressly by the Civil Code with respect to capacity, marriage, matrimonial property, divorce, and succession, provided the foreign law refers back to German law. Article 27, Law Intr. Civ. Code. According to article 28 it is inapplicable, however, to property in a third state where different rules prevail.

The renvoi doctrine was rejected by the Institute of International Law at its session at Neuchâtel in 1900 by a vote of 21 to 6 (v. Bar, Brusa, Harburger, Roguin, Weiss, and Westlake voting in its favor). See Annuaire de l'Institut de Droit International, vol. XVIII, 145–176. It is sanctioned, on the other hand, by article 1 of the Convention of the Hague of June 12, 1902, relating to marriage ("à moins qu'une disposition de cette loi ne se réfère expressément à une autre loi"). See Appendix, A, I.

See also, 20 Harv. Law Rev. 226; Westlake, Priv. Int. Law, 25–40, 326; Dicey, Conflict of Laws, 715–723; Edwin H. Abbot, Jr., Is the Renvoi a Part of the Common Law? 24 Law Quar. Rev. 133–146; John P. Bate, Notes on the Doctrine of Renvoi in Private International Law, London, 1904; T. M. C. Asser, Quelques observations concernant la théorie ou le système du renvoi, 32 Clunet, 40–43; v. Bar, Die Rückverweisung im Internationalen Privatrecht, 8 Niemeyer, 177–188; G. C. Buzzati, Nochmals die Rückverweisung im Internationalen Privatrecht, 8 Niemeyer, 449–456; G. C. Buzzati, Die Frage der Rückverweisung vor dem "Institut de Droit International," 11 Niemeyer, 3–15; P. Fiore, Du conflit entre les dispositions législatives de droit international privé (Théorie de renvoi), 28 Clunet, 424–442, 681–704; J. Klein, Die Rück- und Weiterverweisung im Internationalen Privatrecht, 27 Archiv für bürgerliches Recht, 252–282; J. E. Labbé, Du conflit entre la loi nationale du juge saisi et une loi étrangère relativement à la détermination de la loi applicale à la cause, 12 Clunet, 5–16; A. Lainé, La théorie du renvoi en droit international privé, 2 Darras, 605–643; 3 Darras, 43–72, 313–339, 661–674; 4 Darras, 729–758; Maurice Ligeoix, La théorie du renvoi et la nature juridique des règles de droit international privé, 30 Clunet, 481–498; 31 Clunet, 551–567; J. T. B. Sewell, Du renvoi d'après la jurisprudence anglaise en matière de succession mobilière, 3 Darras, 507–524.

CHAPTER II.

PENAL LAWS.

BLAINE v. CURTIS.

(Supreme Court of Vermont, 1887. 59 Vt. 120, 7 Atl. 708, 59 Am. Rep. 702.)

Action of debt to recover the penalty given by the statute of New Hampshire for taking usury.

WALKER, J. The case comes before us upon general demurrer to the declaration, and the only question to be decided is whether the forfeiture imposed by the laws of New Hampshire upon a person receiving interest at a higher rate than 6 per cent. may be enforced by an action of debt, in favor of the person aggrieved, in this state. The provisions of the statute, which are substantially set out in the declaration, are as follows: "If any person, upon any contract, receives interest at a higher rate than 6 per cent., he shall forfeit three times the sum so received in excess of said 6 per cent. to the person aggrieved who will sue therefor."

It is alleged, in substance, in the declaration, that the defendant, at Piermont, in the state of New Hampshire, received upon a promissory note for the sum of $1,500, then held by the defendant and owing by the plaintiff to her, $30 interest in excess of 6 per cent. from the plaintiff on the first day of May in each year for six years, beginning with May, 1876, and ending with May, 1882; making $180 thus received by the defendant of the plaintiff in excess of 6 per cent. interest during the years named. It is also alleged that, by virtue of the statute of New Hampshire aforesaid, an action hath accrued to the plaintiff to recover of the defendant three times the excess of 6 per cent. interest so paid.

The case stated comes within the statute declared upon, and, if the suit had been instituted in New Hampshire, there could be no doubt of the right of the plaintiff to recover, if the action is not barred in that state by the statute of limitations. The question here is, can the liability imposed by the statute be enforced out of the limits of New Hampshire? This must depend on the nature of the liability, and the manner in which it is created. It is not a responsibility ex contractu; and the question arises, is it a liability imposed by the statute upon a person receiving illegal interest for a violation of its provisions, and penal in its nature, or is it a statute declaratory of a common-law right, and a means or way enacted for enforcing it, and therefore remedial in its nature?

If it only gave a remedy for an injury against the person by whom it is committed to the person injured, and limited the recovery to the mere amount of loss sustained, or to cumulative damages as compensation for the injury sustained, it would fall within the class of remedial statutes. 1 Bl. Comm. 86; Lake v. Smith, 1 Bos. & P. (N. R.) 179, 180; Woodgate v. Knatchbull, 2 Term R. 154, 155, note; Pinkney v. Rutland Co., 2 Saund. 376, note 7; Shore v. Madisten, 1 Salk. 206; Boice v. Gibbons, 8 N. J. Law, 324; Burnett v. Ward, 42 Vt. 80.

But this statute does not limit the recovery to the mere amount of the loss sustained, or to cumulative damages as compensation. It goes beyond, and inflicts a punishment upon the offender. It makes the taking of illegal interest an offense, and prescribes a penalty of three times the amount of illegal interest taken. The right of action under it does not arise out of any privity existing between the person paying and the person receiving the illegal interest, but is derived entirely from the statute. The action given is not to recover back money that the person receiving had no lawful right to take and hold against the person paying it, but one to recover a penalty for a breach of a statute law, and founded entirely upon the statute imposing the forfeiture.

It was held in Hubbell v. Gale, 3 Vt. 266, that whatever may be the form of the action, if it is founded entirely upon a statute, and the object of it is to recover a penalty or forfeiture, it is a penal action. We think the liability created by the statute declared upon is clearly a statutory one, imposed upon the person receiving illegal interest as a wrongdoer, and penal in its nature.

This view is supported by the decisions of many courts of last resort, some of which have been cited in the argument. We refer, however, only to a decision of the Supreme Court of the United States in a case analogous to the case at bar. The provisions of the act in question are similar to the provisions of the national currency act of Congress, approved June 3, 1864, which provides that, if unlawful interest is received by any banking association created by it, the person or persons paying the same, or their legal representatives may recover back, in an action of debt, twice the amount of interest thus paid from the association taking or receiving the same. This provision of the currency act referred to came up for consideration by the Supreme Court of the United States in the case of Barnet v. Muncie Nat. Bank, 98 U. S. 555, 25 L. Ed. 212, where the plaintiff in error sought to avail himself of the benefit of the act in his defense, by way of offset and counterclaim to the bill of exchange on which the suit was brought. Justice Swayne, in delivering the opinion of the court, denied the relief sought, and said: "The remedy given by the statute for the wrong is a penal suit. To that the party aggrieved, or his legal representative, must resort. He can have redress in no other mode or form of procedure. The statute which gives the right prescribes the re-

dress. The suit must be brought especially to recover the penalty, where the sole question is the guilt or innocence of the accused."

This statute has been repeatedly under consideration by the Supreme Court of the state of New Hampshire, and has been by that court invariably treated as a penal statute. Harper v. Bowman, 3 N. H. 489, was an action to recover a forfeiture of three times the illegal interest paid. It was objected that some part of the penalty was barred by the statute of limitations, and the court in considering the question held that the act limiting suits on penal statutes, which provides that actions upon any penal statute shall be brought within one year from the time of committing the offense, was controlling in the decision of the question raised.

In Kempton v. Sullivan Sav. Institution, 53 N. H. 581, the court treated the statute as a penal one, in an able opinion upon its construction, and rules of pleading applicable to actions brought upon it. This construction, which has been given to the statute by the Supreme Court of the state in which it was enacted, treating and holding it a penal statute, should be followed, and is controlling, in courts of this state. Hunt v. Hunt, 72 N. Y. 217, 28 Am. Rep. 129; Leonard v. Columbia Steam Nav. Co., 84 N. Y. 48, 38 Am. Rep. 491.

It is well settled that no state will enforce penalties imposed by the laws of another state. Such laws are universally considered as having no extra-territorial operation or effect, whether the penalty be to the public or to persons. They are strictly local, and effect nothing more than they can reach within the limits of the state in which they were enacted. They cannot be enforced in the courts of another state, either by force of the statute, or upon the principles of state comity, Story, Confl. Laws, §§ 620, 621; Ror. Int. St. Law, 148, 165; Ogden v. Folliot, 3 Term R. 733; Scoville v. Canfield, 14 Johns. 338, 7 Am. Dec. 467; First Nat. Bank of Plymouth v. Price, 33 Md. 487, 3 Am. Rep. 204; Derrickson v. Smith, 27 N. J. Law, 166; Barnes v. Whitaker, 22 Ill. 606; Sherman v. Gassett, 9 Ill. 521; Henry v. Sargeant, 13 N. H. 321, 40 Am. Dec. 146; Slack v. Gibbs, 14 Vt. 357.

Actions for the recovery of a penalty or forfeiture, given by laws of one state upon usurious contracts made and entered into in such state, will not lie in another state. Such laws are held to be penal in their nature, and governed by the general rule that they have no extra-territorial force, and can be enforced only by the courts of the state in which they are enacted. Ror. Int. St. Law, 165; Barnes v. Whitaker, 22 Ill. 606; Sherman v. Gassett, 9 Ill. 521.

The judgment of the county court sustaining the demurrer, and adjudging the declaration insufficient, was correct, and is affirmed.

Rule 1: Penal statutes not enforced. They are statutes where a recovery could be had for indebtedness of the contract.

Rule 2: But the substantive law of contracts, governing a contract as regards making, regulating its performance, etc., will be enforced;

ARNOLD v. POTTER.

(Supreme Court of Iowa, 1867. 22 Iowa, 194.)

appellant in the lawsuit sets up a usury defense. Plaintiff appellee is lender, attempting to collect. The ruling below, but is reversed here.

WRIGHT, J.[1] * * * What was the contract between these parties was a question for the jury to determine. Appellant denies the position assumed by appellee, and insists that this was a contract made in Massachusetts, payable in New York, and that there was no agreement beyond what appears upon the face of the notes; and assuming that the contract might be governed by the law of Massachusetts, the appellee asked and the court gave this instruction: "This court will not enforce the penal statute of another state relating to usury, when that statute does not make the contract wholly void; and, therefore, the statute of Massachusetts is not to be considered by the jury." In this respect, as intimated in the commencement of this opinion, the court below erred.

The statute of Massachusetts (Rev. St. 1836, c. 35, § 2) fixes the rate of interest at six per cent. "If more is reserved, the contract is not void, but the defendant recovers full costs and plaintiff forfeits threefold the amount of the whole interest reserved, and shall have judgment for the balance only, which shall remain due after deducting the threefold amount."

Now, we do not controvert appellee's proposition that our courts will not enforce the penal statutes of another state. The error is in the conclusion based upon such proposition, that, therefore, this statute of Massachusetts will not be enforced, if the contract falls within its provisions. Some cases are relied upon by counsel to which we first direct attention. Gale v. Eastman, 7 Metc. (Mass.) 14, was expressly ruled upon the ground that the law of New Hampshire, where the contract was made, peculiarly related to the remedy, and could not be enforced in Massachusetts. But, aside from the proposition that the remedy provided could only extend to suits brought in New Hampshire, there is nothing remotely bearing upon the question now before us.

There is no intimation that the court refused to act, because the law of the place of the contract was penal; and the same remark is applicable to Wright v. Bartlett, 43 N. H. 548. Scoville v. Canfield, 14 Johns. 338, 7 Am. Dec. 467, decides nothing more, except so far as it states the admitted proposition that the penal laws of one state could have no operation in another, that such laws are strictly local, and affect nothing more than they can reach. De Wolf v. Johnson, 10 Wheat. (U. S.) 367, 6 L. Ed. 343, touches the point here made, very remotely, if at all. It certainly does not go to the extent claimed by the appellee. On the contrary, there is much in it to favor the opposite view. Sherman v. Gassett, 4 Gilman (Ill.) 521, is more in

[1] Only a part of the opinion is given.

point. It was decided by a divided court, Lockwood, J., delivering the opinion of six of the judges, and Kermer, J., the dissenting opinion of the other three. We do not propose to examine it at length. The argument of the majority of the court strikes us as being based upon improper assumptions, and is equally inconclusive in its reasoning; and most pertinently does the dissenting opinion dispose of the whole argument, by saying: "To maintain that we are bound to declare a usurious contract wholly void, when the laws of the place of contract make it so, whereby the creditor is deprived of the whole of his claim, but that we are not bound to regard the law when it provides for a forfeiture only by which the creditor loses but a part of his claim, seems to involve a singular inconsistency. It, in other words, involves the following remarkable syllogism: 'The law everywhere avoids usurious contracts, when they are declared wholly void by the law of the place. This contract was void in part, and consequently it is good in whole.'"

But a more conclusive answer to the case is found in Barnes v. Whitaker, 22 Ill. 606, where the Supreme Court of that state enforced the statute of this state upon a contract made here, so far as it declares that plaintiff shall have judgment for the principal sum, without either interest or costs. They refused, of course, to adjudge the penalty of ten per cent. to the school fund; but the right of the defendant to insist upon the enforcement of our statute in the other respect, is maintained by an argument strong and unanswerable: "It is admitted," says the Chief Justice, in summing up, "that such would be the effect of this law if it had declared that plaintiff should have judgment for nothing. How much more so, in common sense, when it (only) allowed him to take judgment for the principal sum borrowed.

"The distinction in the two cases is not only without reason, but is against all reason, and all sound law and the philosophy of the law."

Now, upon principle, why is not this case in point? Our law says plaintiff shall have judgment for the principal sum without interest or costs. The Massachusetts statute is, that he shall have judgment for the balance only, which shall remain after deducting the threefold amount. In neither case is there a criminal law to enforce a penal statute having operation beyond the limits of the state enacting it. The legal effect of the contracts could not be different in different states, and it is according to this legal effect that all courts are bound to enforce them.

If the law affixed a penalty, and the defendant was in this case seeking to collect it, or if, as under our statute, the defendant forfeited a certain amount to the school or other fund, and we were asked to declare the same, we would have cases to which the instructions in question would apply. Is forfeiture the same as penalty in this connection? This is easily answered. If the law attaches a penalty, as the consequence of an act, it may be sued for and recovered; but it will

be enforced alone in the state declaring the same. If, on the other hand, a person's property may be forfeited or lost by some fault or offense, the forfeiture is not enforced except in the prosecution for the fault or offense; and, if the party guilty of the fault seeks to enforce the contract which he has obtained as the fruits of such offense, he can take no part of the forfeiture. And when he declares and seeks to recover upon such a contract, in another state, if the courts of that state hold that his contract shall be carried out as interpreted by the laws of the state where made, they inflict upon him no penalty, they are not enforcing the penal laws of another state, but enforce the statute of the sister state so far as it effects a discharge of the claim. Gambling is punished by our statute, and a gambling contract is void. Suppose our laws declared that a party holding such a contract might recover one-half and no more. Now, the penalty, the penal statute, would not be enforced in another state; but, in an action upon the contract there, the holder would be limited in his recovery to the one-half. The Massachusetts statute not only uses the word "forfeit," but says the plaintiff shall only have judgment for so much; thus unmistakably keeping up the distinction between a law of this kind and one penal in its nature. * * *

ADAMS v. FITCHBURG R. CO.

(Supreme Court of Vermont, 1894. 67 Vt. 76, 30 Atl. 687, 48 Am. St. Rep. 800.)

Action on the case. Heard upon demurrer to the plaintiff's declaration, at the March term, 1894, Windham county; Ross, C. J., presiding. Judgment sustaining the demurrer, and for the defendant. The plaintiff excepts.

The plaintiff brought suit, as the administratrix of one L. C. Adams, alleging that the defendant was a railroad corporation operating a railroad in the state of Massachusetts, and that her intestate, while a passenger upon said railroad in that state, had been killed by the negligence of the defendant, and without fault upon his part; and that she thereby became entitled to an action in virtue of chapter 112, § 212, of the Public Statutes of Massachusetts, which she alleged was in substance as follows: "If by reason of negligence or carelessness of a corporation operating a railroad or street railway or the unfitness or gross negligence or carelessness of its servants or agents while engaged in its business the life of a passenger or of a person being in the exercise of due diligence and not a passenger or in the employment of such corporation is lost, the corporation shall be punished by fine of not less than five hundred dollars or more than five thousand dollars to be recovered by indictment prosecuted within one year from the time of the injury causing the death and paid to the executor or

administrator for the use of the widow and children of the deceased in equal moieties; or if there are no children to the use of the widow, or if no widow to the use of the next of kin, but a corporation operating a railroad shall not be so liable for the loss of life by a person while walking or being upon its road contrary to law or to the reasonable rules and regulations of the corporation. If the corporation is a railroad corporation it shall also be liable in damages not exceeding five thousand dollars nor less than five hundred dollars to be assessed with reference to the degree of culpability of the corporation or its servants or agents and to be recovered in an action of tort commenced within one year from the injury causing the death by the executor or administrator of the deceased person for the use of the persons hereinbefore specified in a case of indictment."

MUNSON, J. The plaintiff claims to recover by virtue of the provisions of a public statute of Massachusetts. The suit cannot be maintained if the statute declared upon is held to be penal. Blaine v. Curtis, 59 Vt. 120, 7 Atl. 708, 59 Am. Rep. 702. So far as we are informed by counsel, or have been able to ascertain by examination, no construction has been placed upon this statute by the Massachusetts court. It thus becomes necessary for us to give to the statute our own interpretation. Its provisions are different from those of any other statute to which our attention has been called. It is not free from expressions which in themselves would characterize a statute as remedial, rather than penal. The defendant is made liable in damages, and the ascertainment of the amount is characterized as an assessment. It is certain, however, that the designation of the recovery as damages or as a forfeiture is not conclusive as to the character of the statute. A statute giving a right of recovery is often penal as to one party and remedial as to the other. It is said that in such cases the true test is whether the main purpose of the statute is the giving of compensation for an injury sustained, or the infliction of a punishment upon the wrongdoer. We think an application of this test to the provision in question shows it to be penal. The foundation of the action is the loss of a life by reason of the defendant's negligence. There was no right of action at common law. This statute gives a right of action to the personal representative of the deceased for the benefit of the widow and children, or widow, or next of kin. If the right of recovery is established, the damages are to be $500 in any event. Any recovery beyond this is to be assessed with reference to the degree of the defendant's culpability. It appears, then, that whatever the damages may be, or whosoever the person for whose benefit they are recovered, they are not given with reference to the loss sustained. If the recovery could be had only for the benefit of widow and children, the statute might perhaps more easily be looked upon as remedial. But the recovery may be for the benefit of distant relatives, who had no claim upon the deceased for

support. And whether the recovery be for the benefit of widow and children or of distant relatives, the health or habits of the deceased may have been such as to preclude the existence of any appreciable pecuniary interest in the continuance of his life. All these matters, which enter into the question of compensation, are excluded from the inquiry. The wrongdoer is to be punished, whether the person receiving the amount of the recovery has sustained a substantial injury or not. If the beneficiary has in fact received an injury, it is in no way made the basis of the recovery. The provision differs in this respect from those which give damages in excess of the injury received. Statutes giving double damages to an aggrieved party are held not to be penal. Burnett v. Ward, 42 Vt. 80; Reed v. Northfield, 13 Pick. (Mass.) 94, 23 Am. Dec. 662. But in such cases there is an ascertainment of the actual damages, and that ascertainment is the basis of the entire recovery. Here there is no ascertainment of the loss suffered, and, as far as the amount of the verdict is left to the judgment of the jury, it is to be determined by the culpability of the defendant's act, regardless of the injury resulting from it to the persons for whose benefit the suit is brought. It is true that in Newman v. Waite, 43 Vt. 587, an amount given without any reference to the damage sustained was held to be given by way of compensation. But in that case, if the statute had merely created the duty of making the returns, the common law would have enabled the town to recover its actual damages for a failure to do so; and it was taken to have been the purpose of the legislature in its further provision to give a certain sum as fixed damages in lieu of actual damages otherwise recoverable which might not be easily ascertained. But that reasoning is not available here, for in this case the existence of the obligation to carry the deceased with due care did not give these beneficiaries a right to any damages whatever for the neglect complained of. And it is to be noticed that the giving of a fixed sum excludes a consideration of the degree of culpability as well as of the loss sustained. We think the rule given for determining the unascertained part of the recovery is the controlling feature of the statute. It is difficult to say that an assessment which is made to depend solely upon the degree of the party's culpability is not primarily meted out as a punishment. The sum is to be determined by the very considerations that would govern a court in fixing a fine for involuntary manslaughter. The fact that it is given to persons whom the law would have entitled to share in the estate of the deceased cannot control the construction. A statute may be penal although the entire amount recovered be given directly to the party injured. The disposition of the recovery and the limitations of the amount recoverable are the same in the clause declared upon as in the provision for an alternative procedure by indictment, contained in the same section. The provision which is clearly penal serves the same purpose as regards compensation, and has no greater effect as regards

punishment. In view of these considerations, and in the absence of knowledge of a construction by the Massachusetts court, we hold that the provision sued upon is penal. Judgment affirmed, and cause remanded.[2]

DERRICKSON v. SMITH.

(Supreme Court of New Jersey, 1858. 27 N. J. Law, 166.)

Assumpsit in the Morris circuit court against the administrators of John Smith, trustee of the Congress Manufacturing Company, a New York corporation, for noncompliance with a statute of the state of New York requiring corporations to make annual reports and providing that upon a failure to make such reports "all the trustees of the company shall be jointly and severally liable for all debts of the company then existing and for all that shall be contracted before such report shall be made." The defendant demurred to the declaration, and the circuit court certified the case to the Supreme Court for an advisory opinion.[3]

GREEN, C. J.[4] * * * The only question certified for the opinion of this court is, whether the neglect of the company to comply with the requirements of the statute of the state of New York entitles the plaintiffs to recover of the defendants in the courts of this state the amount of their claim against the corporation.

The declaration sets out the statute upon which the action is founded; the organization of the company under the provisions of the statute; the indebtedness of the company to the plaintiffs; that the intestate became a trustee, and that while he was such trustee there was a failure of the company to perform the requirements of the statute, by reason whereof the defendant's intestate became liable to pay the amount of the indebtedness of the company to the plaintiffs.

The objection to the right of the plaintiffs to recover is, that the alleged liability of the defendant, being a mere creature of the statute of a foreign state, cannot be enforced out of the jurisdiction of such state.

The general principle is conceded, that penal laws are strictly local, and that the penal statutes of one state can have no operation in

[2] Accord: O'Reilly v. New York & N. E. R. Co., 16 R. I. 388, 17 Atl. 171, 906, 19 Atl. 244, 5 L. R. A. 364, 6 L. R. A. 719 (1889); Lyman v. Boston & A. R. Co. (C. C.) 70 Fed. 409 (1895); Dale v. Atchison, T. & S. F. R. Co., 57 Kan. 601, 47 Pac. 521 (1897); Raisor v. Chicago & A. R. Co., 215 Ill. 47, 74 N. E. 69, 106 Am. St. Rep. 153 (1905). Contra: Boston & M. R. Co. v. Hurd, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193 (1901); Malloy v. American Hide & Leather Co. (C. C.) 148 Fed. 482 (1906).

[3] This brief statement of facts has been substituted for that contained in the opinion of the Chief Justice.

[4] A part of the opinion and the concurring opinions of Elmer and Vredenburgh, JJ., have been omitted.

another state. Story's Conf. of L. §§ 620, 621. But it is insisted that the provision of the statute which renders the defendant liable is not a penalty in any proper sense, but that the liability of the defendant is founded upon contract.

It has been decided in the state of New York, and seems to be now settled after some conflict of authority, that where a statute or act of incorporation declares that the individual corporators shall be jointly and severally liable for the debts of the corporation, such liability is not founded on the statute, and that a suit against the stockholder, to charge him individually with a debt contracted by the corporation, pursuant to a provision in the act of incorporation, is not an action upon the statute for a forfeiture. Corning v. McCullough, 1 N. Y. 47, 49 Am. Dec. 287; Freeland v. McCullough, 1 Denio (N. Y.) 414, 43 Am. Dec. 685; Harger v. McCullough, 2 Denio (N. Y.) 119; Moss v. Oakley, 2 Hill (N. Y.) 265; Bailey v. Bancker, 3 Hill (N. Y.) 188, 38 Am. Dec. 625; Moss v. McCullough, 5 Hill (N. Y.) 131; Moss v. McCullough, 7 Barb. (N. Y.) 279.

In such case it is held that the stockholders are liable, in an original and primary sense, like partners or members of an unincorporated association, and that their liability is not created by the statute of incorporation. That the effect of such enactment is to invest the company with a qualified corporate capacity, and not to confer upon the stockholders, either directly or indirectly as the consequence of such incorporation or otherwise, any exemption or immunity from personal liability for the debts of the company, to be contracted in its corporate name and capacity.

Without calling in question the soundness of this conclusion, but conceding, for the purpose of the present inquiry, the law to be as settled by the result of these authorities, the present case does not fall within the reach of the principle. In the statute upon which those decisions were founded, the stockholders were declared to be liable for the debts of the corporation, in like manner as if they were members of an unincorporated company. The act of incorporation was so limited or qualified that it did not exempt the stockholders from individual liability for the debts contracted by the corporation; consequently each individual corporator became liable for every debt of the body corporate. Such liability he voluntarily assumed by becoming a member of the corporation. The personal liability of the stockholder to pay the debt is the immediate and necessary consequence of the contract made by the company. It becomes, by the terms of the charter, his debt.

It is clear that this reasoning has no application to the case now under consideration. It is not claimed that the defendant, by the act of incorporation, is individually liable, as a corporator, for the debts of the body corporate, or that his liability attached as a necessary result of the contract made by the company. His liability results from the failure of the trustees to comply with the requirements of

the statute. It is, in fact, a penalty inflicted upon the trustees for a failure to perform a duty enjoined by the statute. It is immaterial whether that penalty be a specified sum or the payment of the debts of the corporation. In either case it is a penalty imposed by statute; nor is it perceived how the liability of the individual trustee to pay the debts of the corporation can be said, in any proper way, to be founded on contract. It certainly did not result from the contract made by the corporation, nor from the defendant becoming a stockholder, nor from his accepting the office of trustee, but solely from the omission to comply with the statute. Now the acceptance of the charter, or the defendant becoming a stockholder, is doubtless an assent to the terms of the charter, but it is, in no appropriate sense, an engagement to pay the debts of the company, imposed as a penalty for violations of the charter. Such liability is clearly the creature of the statute. * * *

With every disposition to yield to the claims of comity, and to sustain, as far as we lawfully may, what may be deemed the salutary legislation of a sister state, I am of opinion that there is no principle upon which the present action can be sustained in the courts of this state, and that the Circuit Court should be advised accordingly.

HUNTINGTON v. ATTRILL.

(Supreme Court of the United States, 1892. 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123.)

This statute is not penal p. 46

Collis P. Huntington, a resident of New York, lent to the Rockaway Beach Improvement Company, Limited, a New York corporation, $100,000 on June 15, 1880, repayable on demand. Henry Y. Attrill was a director of this company and continued to act as such until after January 29, 1881. On June 30, 1880, Attrill, as director of the company, signed and made oath to and caused to be recorded, as required by the law of New York, a certificate, which he knew to be false, stating that the whole of the capital stock of the corporation had been paid in, whereas in truth no part had been paid in. By making such false certificate he became liable, by the law of New York, for all the debts of the company contracted before Jan. 29, 1881. Under this statute Huntington obtained a judgment against Attrill in the Supreme Court of New York for the county of Kings for nearly $100,000; only $932 of the sum borrowed having been repaid.

On March 21, 1888, Huntington filed a bill in the circuit court of Baltimore city against the Equitable Gaslight Company of Baltimore, a Maryland corporation, and against Attrill, his wife and three daughters, to set aside a transfer of stock in that company made by Attrill for their benefit and in fraud of his creditors, and to charge that stock with the payment of the above judgment. One of the

daughters demurred to the bill, because it showed that plaintiff's claim was for the recovery of a penalty against Attrill and because it did not state a case which entitled the plaintiff to any relief in a court of equity in the state of Maryland. The circuit court of Baltimore city overruled the demurrer. On appeal to the Court of Appeals of the state of Maryland, the order was reversed, and the bill dismissed. Attrill v. Huntington, 70 Md. 191, 16 Atl. 651, 2 L. R. A. 779, 14 Am. St. Rep. 344. A writ of error to the Supreme Court of the United States was sued out by Huntington under the "full faith and credit" clause of the federal Constitution.[5]

GRAY, J.[6] * * * The question whether due faith and credit were thereby denied to the judgment rendered in another state is a federal question, of which this court has jurisdiction on this writ of error. Green v. Van Buskirk, 5 Wall. 307, 311, 18 L. Ed. 599; Crapo v. Kelly, 16 Wall. 610, 619, 21 L. Ed. 430; Dupasseur v. Rochereau, 21 Wall. 130, 134, 22 L. Ed. 588; Crescent City Live Stock Co. v. Butchers' Union Slaughter House Co., 120 U. S. 141, 146, 147, 7 Sup. Ct. 472, 30 L. Ed. 614; Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538; Carpenter v. Strange, 141 U. S. 87, 103, 11 Sup. Ct. 960, 35 L. Ed. 640.

In order to determine this question, it will be necessary, in the first place, to consider the true scope and meaning of the fundamental maxim of international law, stated by Chief Justice Marshall in the fewest possible words: "The courts of no country execute the penal laws of another." The Antelope, 10 Wheat. 66, 123, 6 L. Ed. 268. In interpreting this maxim, there is danger of being misled by the different shades of meaning allowed to the word "penal" in our language.

In the municipal law of England and America, the words "penal" and "penalty" have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the state for a crime or offense against its laws. United States v. Reisinger, 128 U. S. 398, 402, 9 Sup. Ct. 99, 32 L. Ed. 480; United States v. Chouteau, 102 U. S. 603, 611, 26 L. Ed. 246. But they are also commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered. They are so elastic in meaning as even to be familiarly applied to cases of private contracts, wholly independent of statutes, as when we speak of the "penal sum" or "penalty" of a bond. In the words of Chief Justice Marshall: "In general, a sum of money in gross, to be paid for the nonperformance of an agreement, is considered as a penalty, the legal operation of which is to cover the damages which the party in whose favor the stipulation is made may have sustained from the breach of contract by

[5] The statement of facts has been abstracted from the opinion.
[6] Portions of the opinion have been omitted.

the opposite party." Tayloe v. Sandiford, 7 Wheat. 13, 17, 5 L. Ed. 384.

Penal laws, strictly and properly, are those imposing punishment for an offense committed against the state, and which, by the English and American Constitutions, the executive of the state has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal.

The action of an owner of property against the hundred to recover damages caused by a mob was said by Justices Willes and Buller to be "penal against the hundred, but certainly remedial as to the sufferer." Hyde v. Cogan, 2 Doug. 699, 705, 706. A statute giving the right to recover back money lost at gaming, and, if the loser does not sue within a certain time, authorizing a qui tam action to be brought by any other person for threefold the amount, has been held to be remedial as to the loser, though penal as regards the suit by a common informer. Bones v. Booth, 2 W. Bl. 1226; Brandon v. Pate, 2 H. Bl. 308; Grace v. McElroy, 1 Allen (Mass.) 563; Read v. Stewart, 129 Mass. 407, 410; Cole v. Groves, 134 Mass. 471. As said by Mr. Justice Ashhurst in the King's Bench, and repeated by Mr. Justice Wilde in the Supreme Judicial Court of Massachusetts, "it has been held in many instances that, where a statute gives accumulative damages to the party grieved, it is not a penal action." Woodgate v. Knatchbull, 2 Term R. 148, 154; Read v. Chelmsford, 16 Pick. (Mass.) 128, 132. Thus a statute giving to a tenant, ousted without notice, double the yearly value of the premises against the landlord, has been held to be "not like a penal law, where a punishment is imposed for a crime," but "rather as a remedial than a penal law," because "the act indeed does give a penalty, but it is to the party grieved." Lake v. Smith, 1 Bos. & P. (N. R.) 174, 179, 180, 181; Wilkinson v. Colley, 5 Burrows, 2694, 2698. So in an action given by statute to a traveler injured through a defect in a highway, for double damages against the town, it was held unnecessary to aver that the facts constituted an offense, or to conclude against the form of the statute, because, as Chief Justice Shaw said: "The action is purely remedial, and has none of the characteristics of a penal prosecution. All damages for neglect or breach of duty operate to a certain extent as punishment; but the distinction is that it is prosecuted for the purpose of punishment, and to deter others from offending in like manner. Here the plaintiff sets out the liability of the town to repair, and an injury to himself from a failure to perform that duty. The law gives him enhanced damages; but still they are recoverable to his own use, and in form and substance the suit calls for indemnity." Reed v. Northfield, 13 Pick. (Mass.) 94, 100, 101, 23 Am. Dec. 662.

The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public

or a wrong to the individual, according to the familiar classification of Blackstone: "Wrongs are divisible into two sorts or species: private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed 'civil injuries'; the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community, and are distinguished by the harsher appellation of 'crimes and misdemeanors.'" 3 Bl. Comm. 2.

Laws have no force of themselves beyond the jurisdiction of the state which enacts them, and can have extraterritorial effect only by the comity of other states. The general rules of international comity upon this subject were well summed up, before the American Revolution, by Chief Justice De Grey, as reported by Sir William Blackstone: "Crimes are in their nature local, and the jurisdiction of crimes is local. And so as to the rights of real property, the subject being fixed and immovable. But personal injuries are of a transitory nature, and sequuntur forum rei." Rafael v. Verelst, 2 W. Bl. 1055, 1058.

Crimes and offenses against the laws of any state can only be defined, prosecuted, and pardoned by the sovereign authority of that state; and the authorities, legislative, executive, or judicial, of other states take no action with regard to them, except by way of extradition, to surrender offenders to the state whose laws they have violated, and whose peace they have broken. * * *

Upon the question what are to be considered penal laws of one country, within the international rule which forbids such laws to be enforced in any other country, so much reliance was placed by each party in argument upon the opinion of this court in Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239, that it will be convenient to quote from that opinion the principal propositions there affirmed:

"The rule that the courts of no country execute the penal laws of another applies, not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties." Page 290, 127 U. S., and page 1374, 8 Sup. Ct. (32 L. Ed. 239).

"The application of the rule to the courts of the several states and of the United States is not affected by the provisions of the Constitution and of the act of Congress, by which the judgments of the courts of any state are to have such faith and credit given to them in every court within the United States as they have by law or usage in the state in which they were rendered." Page 291, 127 U. S., and page 1375, 8 Sup. Ct. (32 L. Ed. 239).

"The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it; and the technical rules, which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude a court, to which a judgment is presented for affirmative action (while it cannot go behind the judgment for the purpose of examining into the validity of the claim), from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it." Pages 292, 293, 127 U. S., and page 1375, 8 Sup. Ct. (32 L. Ed. 239).

"The statute of Wisconsin, under which the state recovered in one of her own courts the judgment now and here sued on, was in the strictest sense a penal statute, imposing a penalty upon any insurance company of another state doing business in the state of Wisconsin without having deposited with the proper officer of the state a full statement of its property and business during the previous year. The cause of action was not any private injury, but solely the offense committed against the state by violating her law. The prosecution was in the name of the state, and the whole penalty, when recovered, would accrue to the state." Page 299, 127 U. S., and page 1378, 8 Sup. Ct. (32 L. Ed. 239).

Such were the grounds upon which it was adjudged in that case that this court, under the provision of the Constitution giving it original jurisdiction of actions between a state and citizens of another state, had no jurisdiction of an action by a state upon a judgment recovered by it in one of its own courts against a citizen or a corporation of another state for a pecuniary penalty for a violation of its municipal law.[7] * * *

For the purposes of extraterritorial jurisdiction, it may well be that actions by a common informer, called, as Blackstone says, " 'popular actions,' because they are given to the people in general," to recover a penalty imposed by statute for an offense against the law, and which may be barred by a pardon granted before action brought, may stand on the same ground as suits brought for such a penalty in the name of the state or of its officers, because they are equally brought to enforce the criminal law of the state. 3 Bl. Comm. 161, 162; 2 Bl. Comm. 437, 438; Adams v. Woods, 2 Cranch, 336, 2 L. Ed. 297; Gwin v. Breedlove, 2 How. 29, 11 L. Ed. 167; United States v. Connor, 138 U. S. 61, 66, 11 Sup. Ct. 229, 34 L. Ed. 860; Bryant v. Ela, Smith (N. H.) 396. And personal disabilities imposed by the law of a state, as an incident or consequence of a judicial sentence or decree, by way of punishment of an offender, and not for the benefit of any other person—such as attainder, or infamy, or incompetency of a convict to testify, or disqualification of the guilty party to a cause of divorce for adultery to marry again—are doubtless strictly penal, and

[7] See Fauntleroy v. Lum, 210 U. S. 230, 28 Sup. Ct. 641, 52 L. Ed. 1039 (1908).

therefore have no extraterritorial operation. Story, Confl. Law, §§ 91, 92; Dicey, Dom. 162; Folliott v. Ogden, 1 H. Bl. 123, and 3 Term R. 726; Logan v. United States, 144 U. S. 263, 303, 12 Sup. Ct. 617, 36 L. Ed. 429; Dickson v. Dickson, 1 Yerg. (Tenn.) 110, 24 Am. Dec. 444; Ponsford v. Johnson, 2 Blatchf. 51, Fed. Cas. No. 11,266; Commonwealth v. Lane, 113 Mass. 458, 471, 18 Am. Rep. 509; Van Voorhis v. Brintnall, 86 N. Y. 18, 28, 29, 40 Am. Rep. 505.

The question whether a statute of one state, which in some aspects may be called penal, is a penal law, in the international sense, so that it cannot be enforced in the courts of another state, depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act. There could be no better illustration of this than the decision of this court in Dennick v. Central R. Co. of New Jersey, 103 U. S. 11, 26 L. Ed. 439. * * *

That decision is important as establishing two points: (1) The court considered "criminal laws," that is to say, laws punishing crimes, as constituting the whole class of penal laws which cannot be enforced extraterritorially. (2) A statute of a state, manifestly intended to protect life, and to impose a new and extraordinary civil liability upon those causing death, by subjecting them to a private action for the pecuniary damages thereby resulting to the family of the deceased, might be enforced in a circuit court of the United States held in another state, without regard to the question whether a similar liability would have attached for a similar cause in that state. * * *

The provision of the statute of New York now in question, making the officers of a corporation, who sign and record a false certificate of the amount of its capital stock, liable for all its debts, is in no sense a criminal or quasi criminal law. The statute, while it enables persons complying with its provisions to do business as a corporation, without being subject to the liability of general partners, takes pains to secure and maintain a proper corporate fund for the payment of the corporate debts. With this aim, it makes the stockholders individually liable for the debts of the corporation until the capital stock is paid in, and a certificate of the payment made by the officers, and makes the officers liable for any false and material representation in that certificate. The individual liability of the stockholders takes the place of a corporate fund, until that fund has been duly created; and the individual liability of the officers takes the place of the fund, in case their statement that it has been duly created is false. If the officers do not truly state and record the facts which exempt them from liability, they are made liable directly to every creditor of the company, who by reason of their wrongful acts has not the security, for the payment of his debt out of the corporate property, on which he had a right to rely. As the statute imposes a burdensome liability on the officers for their wrongful act, it may well be considered penal, in the sense that it should be strictly construed. But as it gives a civil remedy, at the

private suit of the creditor only, and measured by the amount of his debt, it is as to him clearly remedial. To maintain such a suit is not to administer a punishment imposed upon an offender against the state, but simply to enforce a private right secured under its laws to an individual. We can see no just ground, on principle, for holding such a statute to be a penal law, in the sense that it cannot be enforced in a foreign state or country.

The decisions of the Court of Appeals of New York, so far as they have been brought to our notice, fall short of holding that the liability imposed upon the officers of the corporation by such statutes is a punishment or penalty which cannot be enforced in another state. * * *

It is true that the courts of some states, including Maryland, have declined to enforce a similar liability imposed by the statute of another state. But in each of those cases it appears to have been assumed to be a sufficient ground for that conclusion that the liability was not founded in contract, but was in the nature of a penalty imposed by statute; and no reasons were given for considering the statute a penal law, in the strict, primary, and international sense. Derrickson v. Smith, 27 N. J. Law, 166; Halsey v. McLean, 12 Allen (Mass.) 438, 90 Am. Dec. 157; First Nat. Bank of Plymouth v. Price, 33 Md. 487, 3 Am. Rep. 204. * * *

p. 39 contra.

The true limits of the international rule are well stated in the decision of the judicial committee of the Privy Council of England, upon an appeal from Canada, in an action brought by the present plaintiff against Attrill in the province of Ontario upon the judgment to enforce which the present suit was brought. The Canadian judges, having in evidence before them some of the cases in the Court of Appeals of New York, above referred to, as well as the testimony of a well-known lawyer of New York that such statutes were, and had been held by that court to be, strictly penal and punitive, differed in opinion upon the question whether the statute of New York was a penal law, which could not be enforced in another country, as well as upon the question whether the view taken by the courts of New York should be conclusive upon foreign courts, and finally gave judgment for the defendant. Huntington v. Attrill, 17 Ont. 245, and 18 Ont. App. 136.

In the Privy Council, Lord Watson, speaking for Lord Chancellor Halsbury and other judges, as well as for himself, delivered an opinion in favor of reversing the judgment below, and entering a decree for the appellant, upon the ground that the action "was not, in the sense of international law, penal, or, in other words, an action on behalf of the government or community of the state of New York for punishment of an offense against their municipal law." The fact that that opinion has not been found in any series of Reports readily accessible in this country, but only in 8 Law T. R. 341, affords special reasons for quoting some passages.

"The rule" of international law, said Lord Watson, "had its foundation in the well-recognized principle that crimes, including in that

term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the state government, or of some one representing the public, were local in this sense—that they were only cognizable and punishable in the country where they were committed. Accordingly no proceeding, even in the shape of a civil suit, which had for its object the enforcement by the state, whether directly or indirectly, of punishment imposed for such breaches by the lex loci, ought to be admitted in the courts of any other country. In its ordinary acceptation, the word 'penal' might embrace penalties for infractions of general law, which did not constitute offenses against the state; it might, for many legal purposes, be applied with perfect propriety to penalties created by contract; and it, therefore, when taken by itself, failed to mark that distinction between civil rights and criminal wrongs which was the very essence of the international rule."

After observing that, in the opinion of the judicial committee, the first passage above quoted from Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 290, 8 Sup. Ct. 1370, 32 L. Ed. 239, "disclosed the proper test for ascertaining whether an action was penal, within the meaning of the rule," he added: "A proceeding, in order to come within the scope of the rule, must be in the nature of a suit in favor of the state whose law had been infringed. All the provisions of municipal statutes for the regulation of trade and trading companies were presumably enacted in the interest and for the benefit of the community at large; and persons who violated those provisions were, in a certain sense, offenders against the state law, as well as against individuals who might be injured by their misconduct. But foreign tribunals did not regard those violations of statute law as offenses against the state, unless their vindication rested with the state itself, or with the community which it represented. Penalties might be attached to them, but that circumstance would not bring them within the rule, except in cases where those penalties were recoverable at the instance of the state, or of an official duly authorized to prosecute on its behalf, or of a member of the public in the character of a common informer. An action by the latter was regarded as an actio popularis, pursued, not in his individual interest, but in the interest of the whole community."

He had already, in an earlier part of the opinion, observed: "Their lordships could not assent to the proposition that, in considering whether the present action was penal in such sense as to oust their jurisdiction, the courts of Ontario were bound to pay absolute deference to any interpretation which might have been put upon the statute of 1875 in the state of New York. They had to construe and apply an international rule, which was a matter of law entirely within the cognizance of the foreign court whose jurisdiction was invoked. Judicial decisions in the state where the cause of action arose were not precedents which must be followed, although the reasoning upon which they were founded must always receive careful consideration and might be conclusive. The court appealed to must determine for

itself, in the first place, the substance of the right sought to be enforced; and, in the second place, whether its enforcement would, either directly or indirectly, involve the execution of the penal law of another state. Were any other principle to guide its decision, a court might find itself in the position of giving effect in one case, and denying effect in another, to suits of the same character, in consequence of the causes of action having arisen in different countries, or in the predicament of being constrained to give effect to laws which were, in its own judgment, strictly penal."

In this view, that the question is not one of local, but of international, law, we fully concur. The test is not by what name the statute is called by the Legislature or the courts of the state in which it was passed, but whether it appears, to the tribunal which is called upon to enforce it, to be, in its essential character and effect, a punishment of an offense against the public, or a grant of a civil right to a private person.

In this country, the question of international law must be determined in the first instance by the court, state or national, in which the suit is brought. If the suit is brought in a Circuit Court of the United States, it is one of those questions of general jurisprudence which that court must decide for itself, uncontrolled by local decisions. Burgess v. Seligman, 107 U. S. 20, 33, 2 Sup. Ct. 10, 27 L. Ed. 359; Texas & P. Ry. Co. v. Cox, 145 U. S. 593, 605, 12 Sup. Ct. 905, 36 L. Ed. 829; above cited. If a suit on the original liability under the statute of one state is brought in a court of another state, the Constitution and laws of the United States have not authorized its decision upon such a question to be reviewed by this court. New York Life Ins. Co. v. Hendren, 92 U. S. 286, 23 L. Ed. 709; Roth v. Ehman, 107 U. S. 319, 2 Sup. Ct. 312, 27 L. Ed. 499. But if the original liability has passed into judgment in one state, the courts of another state, when asked to enforce it, are bound by the Constitution and laws of the United States to give full faith and credit to that judgment; and, if they do not, their decision, as said at the outset of this opinion, may be reviewed and reversed by this court on writ of error. The essential nature and real foundation of a cause of action, indeed, are not changed by recovering judgment upon it. This was directly adjudged in Wisconsin v. Pelican Ins. Co., above cited. The difference is only in the appellate jurisdiction of this court in the one case or in the other.

If a suit to enforce a judgment rendered in one state, and which has not changed the essential nature of the liability, is brought in the courts of another state, this court, in order to determine, on writ of error, whether the highest court of the latter state has given full faith and credit to the judgment, must determine for itself whether the original cause of action is penal, in the international sense. The case, in this regard, is analogous to one arising under the clause of the Constitution which forbids a state to pass any law impairing the obliga-

tion of contracts, in which, if the highest court of a state decides nothing but the original construction and obligation of a contract, this court has no jurisdiction to review its decision; but if the state court gives effect to a subsequent law, which is impugned as impairing the obligation of a contract, this court has power, in order to determine whether any contract has been impaired, to decide for itself what the true construction of the contract is. New Orleans Water-Works Co. v. Louisiana Sugar-Refining Co., 125 U. S. 18, 38, 8 Sup. Ct. 741, 31 L. Ed. 607. So if the state court, in an action to enforce the original liability under the law of another state, passes upon the nature of that liability, and nothing else, this court cannot review its decision; but if the state court declines to give full faith and credit to a judgment of another state, because of its opinion as to the nature of the cause of action on which the judgment was recovered, this court, in determining whether full faith and credit have been given to that judgment, must decide for itself the nature of the original liability. * * *

The judgment rendered by a court of the state of New York, now in question, is not impugned for any want of jurisdiction in that court. The statute under which that judgment was recovered was not, for the reasons already stated at length, a penal law, in the international sense. The faith and credit, force and effect, which that judgment had by law and usage in New York was to be conclusive evidence of a direct civil liability from the individual defendant to the individual plaintiff for a certain sum of money, and a debt of record, on which an action would lie, as on any other civil judgment inter partes. The Court of Appeals of Maryland, therefore, in deciding this case against the plaintiff, upon the ground that the judgment was not one which it was bound in any manner to enforce, denied to the judgment the full faith, credit, and effect to which it was entitled under the Constitution and laws of the United States.

Judgment reversed, and case remanded to the Court of Appeals of the state of Maryland for further proceedings not inconsistent with the opinion of this court.[8]

[8] Fuller, C. J., dissented (opinion omitted). Lamar and Shiras, JJ., did not sit.

Another principle operating to modify the application of the general rules governing the Conflict of Laws is found in the doctrine of the federal courts according to which they decline in matters of general commercial law, or of general, instead of local, law, to follow the principles adopted by the courts of the state where the cause of action arose. Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865 (1842); Baltimore & Ohio R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772 (1893).

A similar exception is recognized by a few of the state courts. Franklin v. Twogood, 25 Iowa, 520, 96 Am. Dec. 73 (1868); St. Nicholas Bank v. State Nat. Bank, 128 N. Y. 26, 27 N. E. 849, 13 L. R. A. 241 (1891); Roads v. Webb, 91 Me. 406, 40 Atl. 128, 64 Am. St. Rep. 246 (1898). But not generally. Forepaugh v. Delaware, L. & W. R. Co., 128 Pa. 217, 18 Atl. 503, 5 L. R. A. 508, 15 Am. St. Rep. 672 (1889); Limerick Nat. Bank v. Howard, 71 N. H. 13, 51 Atl. 641, 93 Am. St. Rep. 489 (1901).

CHAPTER III.

PROCEDURE.

MALE v. ROBERTS.

(Nisi Prius, in the Common Pleas. 1800, 3 Esp., 163.)

Assumpsit for money paid, laid out, and expended, to the use of the defendant; money lent and advanced, with the other common money counts.

Plea of the general issue.

The case, as opened by the plaintiff's counsel, was, that the plaintiff and the defendant were performers at the Royal Circus. While the company were performing at Edinburgh, in Scotland, the defendant had become indebted to one Cockburn, for liquors of different sorts, with which Cockburn had furnished him; not having discharged the debt, and it being suspected that the defendant was about to leave Scotland, Cockburn arrested him, by what is there termed a Writ of Fugé, the object of which is to prevent the debtor from absconding.

The defendant being then unable to pay the money, the plaintiff paid it for him; and he was liberated. The present action was brought to recover the money so paid, as money paid to his use.

The defence relied upon was, that the defendant was an infant when the money was so advanced.

Lord ELDON. It appears from the evidence in this cause, that the cause of action arose in Scotland; the contract must be therefore governed by the laws of that country where the contract arises. Would infancy be a good defence by the law of Scotland, had the action been commenced there?

Best, Sergeant, for the defendant, contended, that the contract was to be governed by the laws of England; in which case, the plaintiff could recover for necessaries only. That at all events it should not be presumed that the laws were different; and as it appeared that the debt did not accrue for necessaries, the plaintiff could neither recover on the counts for money paid, or for money lent to an infant.

Lord ELDON. What the law of Scotland is with respect to the right of recovering against an infant for necessaries, I cannot say; but if the law of Scotland is, that such a contract as the present could not be enforced against an infant, that should have been given in evidence; and I hold myself not warranted in saying that such a contract is void by the law of Scotland, because it is void by the law of England. The

law of the country where the contract arose, must govern the contract; and what that law is, should be given in evidence to me as a fact. No such evidence has been given; and I cannot take the fact of what that law is, without evidence.

The plaintiff failed in proving his case, and was nonsuited.[1]

[1]Accord: Thompson v. Ketchum, 8 Johns. (N. Y.) 189, 5 Am. Dec. 332 (1811). See, in general, 113 Am. St. Rep. 868–884; 67 L. R. A. 33–61.

In suits upon foreign judgments some courts will, by way of exception, take judicial notice for some purposes of the laws of another state. Paine v. Schenectady Ins. Co., 11 R. I. 411 (1876). Black on Judgments (2d Ed.) §§ 860, 917.

As to judicial notice by the federal courts, see Owings v. Hull, 9 Pet. (U. S.) 607, 9 L. Ed. 246 (1835); Hanley v. Donoghue, 116 U. S. 1, 6 Sup. Ct. 242, 29 L. Ed. 535 (1885).

In the absence of proof of the foreign law, courts will often presume that it is identical with the common law as understood at the forum. Flagg v. Baldwin, 38 N. J. Eq. 219, 48 Am. Rep. 308 (1884); Commonwealth v. Graham, 157 Mass. 73, 31 N. E. 706, 16 L. R. A. 578, 34 Am. St. Rep. 255 (1892); Vanderpoel v. Gorman, 140 N. Y. 563, 35 N. E. 932, 24 L. R. A. 548, 37 Am. St. Rep. 601 (1894). Provided, however, that the jurisprudence of such foreign state rests essentially upon the common law. Aslanian v. Dostumian, 174 Mass. 328, 54 N. E. 845, 47 L. R. A. 495, 75 Am. St. Rep. 348 (1899). If the foreign law rests essentially upon some other system of law, the general law of the forum, whether common-law or statutory, will usually be applied. Brown v. Wright, 58 Ark. 20, 22 S. W. 1022, 21 L. R. A. 467 (1893); Peet & Co. v. Hatcher, 112 Ala. 514, 21 South. 711, 57 Am. St. Rep. 45 (1896). Some courts apply the law of the forum, whether common-law or statutory, irrespective of the general nature of the foreign system of law. Bagwell v. McTighe, 85 Tenn. 616, 4 S. W. 46 (1887); Cavallaro v. Texas & P. R. Co., 110 Cal. 348, 42 Pac. 918, 52 Am. St. Rep. 94 (1895); Barringer v. Ryder, 119 Iowa, 121, 93 N. W. 56 (1903). But not in the case of statutes prescribing penalties or forfeitures. Hubble v. Morristown Land & Improvement Co., 95 Tenn. 595, 32 S. W. 965 (1895).

A statute of another state creating a cause of action not existing at common law, must be proved, and no presumption will apply. Morgan v. Beaumont, 121 Mass. 7 (1876); Atchison, T. & S. F. R. Co. v. Betts, 10 Colo. 431, 15 Pac. 821 (1887); Myers v. Chicago, St. P., M. & O. R. Co., 69 Minn. 476, 72 N. W. 694, 65 Am. St. Rep. 579 (1897).

CONTINENTAL LAW.—Foreign law must generally be proved by the parties as a fact, and in the absence of such proof the lex fori will be applied. *France.*—App. Pau, Feb. 14, 1882 (S. 1884, 2, 129); Trib. Civ. Seine, July 18, 1885 (13 Clunet, 202). *Italy.*—Cass. Turin, Nov. 9, 1891 (La Legge, 1892, 1, 83); but the parties need not prove it, if it is well known to the judge. App. Turin, Dec. 7, 1894 (Giurispr. Ital. 1895, 2, 127). *Germany.*—Section 293, Code Civ. Proc., requires the judge ex officio to inform himself with respect to the foreign law; but it has been held that, where the parties fail to prove the foreign law, the lex fori may be applied, in the absence of personal knowledge of such foreign law on the part of the judge. 2 R. O. H. G. 27 (Feb. 14, 1871). See, also, Planck, Bürgerliches Gesetzbuch (3d Ed.) vol. VI, art. 7–31, 8 (p. 27).

A mistake made by the trial judge with respect to a foreign law is, therefore, not subject to revision by the courts of last resort. *France.*—Cass. June 15, 1899 (S. 1901, 1, 303); Cass. July 18, 1904 (2 Darras, 544). See Cass. Aug. 2, 1893 (S. 1895, 1, 449). *Germany.*—Sections 549, 562, Code Civ. Proc. Contra: *Italy.*—At least if the judge is specifically directed to apply such foreign law. Cass. Florence, Apr. 25, 1881 (Monitore, 1881, p. 601); Cass. Naples, Jan. 26, 1897 (Monitore, 1897, p. 466).

See, also, A. Darras, De la connaissance, de l'application et de la preuve de la loi étrangère. 28 Clunet, 209–231, 442–456.

RUHE v. BUCK.

(Supreme Court of Missouri, 1894. 124 Mo. 178, 27 S. W. 412, 25 L. R. A. 178, 46 Am. St. Rep. 439.)

GANTT, P. J.[2] This record presents this case: At the time of the transactions involved, a married woman in Missouri was incompetent to make a valid contract at law. At that time, however, she was authorized by the laws of Dakota to contract as a feme sole, and sue and be sued as such. Mrs. Buck, the wife of O. W. Buck, became the purchaser of a city lot in Tarkio, Mo., and held a bond for title from Perkins, the owner, until a balance of the purchase money should be paid. Under the firm name of O. W. Buck & Co., Mrs. Buck and her husband became indebted in Dakota, and the interest of herself and her husband in said lot was attached for said debt, in an action commenced in the circuit court of Atchison county, Mo. After this attachment was levied on the lot, Mrs. Buck sold the lot to Thompson and Trout, who afterwards paid the balance of the purchase money to Perkins, and received a warranty deed from Perkins, which was recorded. That a married woman was not subject to a suit by attachment in Missouri prior to 1889 was decided by this court in Gage v. Gates, 62 Mo. 412; and that a judgment obtained against her in such a proceeding was a nullity was repeated in Lincoln v. Rowe, 64 Mo. 138; and that she could not be sued as a member of a mercantile firm at law was also settled in Weil v. Simmons, 66 Mo. 617. From these and many other decisions, it would appear that no resident creditor could proceed by an attachment at law against a married woman in this state for a debt contracted in this state, and this record presents the question whether our laws will give nonresident creditors remedies to collect their claims against a married woman in this state, which we uniformly deny to our own citizens. The Supreme Court of the United States in Scudder v. Union Nat. Bank of Chicago, 91 U. S. 406, 23 L. Ed. 245, sums up the general principle in a few words: "Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit was brought." So that while we concede that, by the laws of Dakota, Mrs. Buck could enter into a contract of partnership with her husband, and become bound for the debts of that partnership, the question remains, when the creditors sue her in this state, are they bound to take such remedies, and such only, as our laws offer against a married woman (for such she remains, notwithstanding her capacity to con-

[2] A part of the opinion and the dissenting opinion of Sherwood, J., have been omitted.

tract and sue and be sued), or are we bound to treat her as a single person? Judge Story, in his treatise on the Conflict of Laws (8th Ed., § 556), says: "Having stated these general principles in relation to jurisdiction (the result of which is that no nation can rightfully claim to exercise it except as to persons and property within its own domains), we are next led to the consideration of the question in what manner suits arising from foreign causes are to be instituted and proceedings to be had until the final judgment. Are they to be according to the law of the place where the parties, or either of them, live, or are they to be according to the modes of proceeding and forms of suit prescribed by the laws of the place where the suits are brought? Fortunately, here there is scarcely any ground left open for controversy, either at the common law or in the opinions of foreign jurists or in the actual practice of nations. It is universally admitted and established that the forms of remedies and modes of proceeding and the execution of judgments are to be regulated solely and exclusively by the laws of the place where the action is instituted, or * * * according to the lex fori."

[The learned justice here commented upon Williams v. Haines, 27 Iowa, 251, 1 Am. Rep. 268; Mathuson v. Crawford, 4 McLean, 540, Fed. Cas. No. 9,279; Mineral Point R. Co. v. Barron, 83 Ill. 365; Burchard v. Dunbar, 82 Ill. 450, 25 Am. Rep. 334; Milliken v. Pratt, 125 Mass. 374, 28 Am. Rep. 241.]

That the law of the forum governs as to remedies in the enforcement of contracts, see, also, Pickering v. Fisk, 6 Vt. 102; Commercial Nat. Bank v. Chicago, M. & St. P. Ry. Co., 45 Wis. 172; Leiber v. Union Pac. R. Co., 49 Iowa, 688; Denny v. Faulkner, 22 Kan. 89; Green v. Van Buskirk, 5 Wall. (U. S.) 307, 18 L. Ed. 599; Whart. Confl. Laws, § 121; Bank of United States v. Donnally, 8 Pet. (U. S.) 362, 8 L. Ed. 974; Laird v. Hodges, 26 Ark. 356. A case very similar to this arose in Illinois. An action at law was brought against a married woman. She pleaded coverture at the time of making the contract and the commencement of the action. Reply: "Contract good by the laws of Iowa, where it was made, and a liability to suit as a feme sole in that state." Discussing the sufficiency of this reply, the Supreme Court of Illinois said: "A party seeking to enforce a contract valid by the laws of another state must avail of the remedy provided by our laws. * * * That part of the replication which alleges that, by the laws of the state of Iowa, a married woman could be sued alone on contracts concerning her separate property, did present an immaterial issue." But because, by the laws of Illinois, she could be sued alone, it was held that enough remained to make a good replication. Halley v. Ball, 66 Ill. 250. A different conclusion was reached in Robinson v. Queen, 87 Tenn. 445, 11 S. W. 38, 3 L. R. A. 214, 10 Am. St. Rep. 690, although the court recognized the rule already stated, in these words: "Under this rule, we act in requiring the husband to be a party defendant with the wife, as was done in the case at bar. While under the laws of

Kentucky, this married woman has had her disabilities removed, and can contract, sue, and be sued as a feme sole, we recognize and enforce in this state [Tennessee] so much of the foreign law as determines and fixes her liability—in other words, the law of the contract; but in enforcing such liability in the courts of this state, if she is plaintiff, she must sue by next friend or with her husband, and, as defendant, her husband must be joined with her as a party." In other words, her status as a married woman, by the laws of Tennessee, still remained, and the remedies there given against a married woman controlled. That was a proceeding in a chancery court, and we are not sufficiently advised of the practice in that state to draw any conclusion as to its persuasiveness as an authority for the practice here invoked. The general principle announced is in harmony with the rule heretofore deduced. In Gibson v. Sublett, 82 Ky. 596, the Court of Appeals of Kentucky held a married woman personally liable in Kentucky on a note executed in Louisiana, although, if she had made the note in Kentucky, her promise would have been void. The reasons for this decision are tersely stated by the court. They say: "And if, by the law of the place of the domicile of the husband, a married woman has a capacity to sue or to make a contract or to ratify an act, her acts so done will be held valid everywhere. Story, Confl. Laws, § 66a. If, then, the contract is to be held valid and binding here because it is so in the state where it was made, it would seem to reasonably follow that her property here should be subject; for to hold that a valid and binding contract is not enforceable at any time nor in any manner is absurd." And the court consequently held "that the remedy provided for the satisfaction of judgments in Kentucky should be applied as though the judgment was against a feme sole." Entertaining, as we do, the highest respect for the court that decided this case, we do not think its reasoning convincing in that case. In our opinion, it has mingled the "lex loci contractus" with the "lex fori," which are distinct in their nature and obligation, and treats them as one. We do not think that many other courts have gone so far. The rule which recognizes the binding force of the contract where made has never gone to the extent of attaching to it the local remedies, and carrying them into another jurisdiction, but it is left to each nation and state to enforce such a contract according to its own laws.

As already said, when this action was brought, this court had, by uniform decisions, held that a married woman could not be sued by attachment in actions at law in Missouri. No such remedy was available in our courts in favor of resident creditors. Had any citizen of Missouri, on a contract made or to be performed in this state, proceeded by attachment at law against this real estate, no lien would have been created, and no valid judgment could have been rendered against Mrs. Buck, and no purchaser for value would have been affected; but, if plaintiff's contention is true, the fact that this claim originated in Dakota has changed all this, and his attachment is as valid as if Mrs. Buck was a

single woman. But Mrs. Buck is still a married woman, and there was no such exception in our Code of Procedure in favor of contracts executed beyond our borders when this suit was brought, and an attempt to enforce such a distinction out of a spirit of comity would create endless confusion. A purchaser's rights ought not to depend upon the accidental circumstance of the place of the execution of the contract upon which the judgment is based. Our courts administer justice without distinction, according to the modes prescribed by the state, and those who seek them must take such remedies as are prescribed. An infant's contract may be good in Illinois, but, if he is sued in Missouri, he is proceeded against as an infant, by next friend or guardian. His status, for the purposes of the action, is determined by our laws in force when the suit is brought. It follows that the circuit court properly held that the proceedings by attachment against Mrs. Buck were void, and hence presented no obstacle to the purchase by Trout and Thompson, and its judgment is affirmed.[3]

SAUNDERS v. AMERICAN EXPRESS CO.

(Supreme Court of New Jersey, 1904. 71 N. J. Law, 270, 57 Atl. 899.)

SWAYZE, J. In this case I allowed a rule to show cause why the service of a summons should not be set aside, and made the rule returnable before me at chambers. Depositions were taken, and the matter argued in pursuance of the rule.

The ground relied upon for setting aside the summons is that the defendant is not a corporation, but a joint-stock association, organized under the laws of New York, and it is contended that the suit should have been brought against the president or treasurer by name, pursuant to the provisions of the New York Code authorizing that procedure. The case of Edgeworth v. Wood, 58 N. J. Law, 463, 33 Atl. 940, was relied upon. In that case an action was brought against "Theodore F. Wood, treasurer of the United States Express Company," for a tort for which the express company was liable. After verdict for the plaintiff it was argued, upon a rule to show cause, that the action should have been brought against the United States Express Company by that name, under our statute authorizing suit against unincorporated organizations by their recognized name. The only question actually presented was whether a cause of action which existed against the organization could form the basis of a suit in name against one of its officers, and the proceedings were sustained because the procedure was that provided by the New York statute. I do not understand that the court decided that it would have been improper to have sued the express company by its recognized name; on the contrary, the reasoning

[3] See 57 L. R. A. 520–523.

of the court was that the express company was, by virtue of the New York statutes, a corporate entity, and that the status of Wood was that of a representative of the company. The construction adopted by the court was based upon a New York statute, chapter 258 (238 in the report is evidently a misprint), p. 389, of the Laws of 1849, and upon two sections of the Code of Procedure, which statutes were put in evidence. In the present case later statutes were put in evidence by counsel for the plaintiff, and it now appears that the act of 1849 was repealed in 1880 (page 367, c. 245). The history of the New York legislation is important. The act of 1849 provided that any joint-stock company or association might sue and be sued in the name of the president or treasurer, but reserved to the plaintiff the right, after judgment against the association, to sue all or any of the shareholders individually, and also the right to proceed in the first instance against the persons constituting the joint-stock company or association. In 1853, by chapter 153, p. 283, of the Statutes, it was made obligatory to proceed in the first instance against the president or treasurer, and only in the event of a judgment and an execution returned unsatisfied could an action be brought against the shareholders or associates individually. This act also was repealed in 1880 (chapter 245). The present Code of Civil Procedure, by section 1919, authorizes suits against the association in the name of the president and treasurer, as by the act of 1849, but in sections 1922 and 1923 modifies the act of 1853, so that it is no longer obligatory to bring suit in the first instance against the president or treasurer. The plaintiff is given his choice to bring a suit against the association in the name of the president or treasurer, or to bring his suit against all the members of the association. As was said by Judge Finch, in People ex rel. Winchester v. Coleman, 133 N. Y. 279, 31 N. E. 96, 97, 16 L. R. A. 183: "Permission to sue their president or treasurer is only a convenient mode of enforcing that liability, but in no manner creates or raises it. The statute of 1853 did interfere with it. That act required, in the first instance, a suit against the president or treasurer, and so a preliminary exhaustion of the joint property. But that act was modal, and determined the procedure. It suspended the common-law right, but recognized its existence. We so held in Witherhead v. Allen, 4 Abb. Dec. 628, and at the same time said that the associations were not corporations, but mere partnership concerns. Even that mode of procedure has been modified by the Code, so that the creditor at his option may sue the association without first bringing his action against the president or treasurer." In view of the fact that the plaintiff has this option in the state of New York, we certainly cannot hold that he is limited in New Jersey to the method of procedure prescribed by the act of 1853. That procedure is permissible in this state only by comity; such a procedure could not be made obligatory by private contract. Bank of Toronto v. Manufacturers' & Merchants' Fire Association, 63 N J. Law, 5, 12, 42 Atl. 761. As it has not been made obligatory by the laws of New York, it ought not to be made obliga-

N.Y. Code.

tory in this state, especially as it is not in harmony with our modes of procedure.

The question of the party to be sued is one of procedure, and is regulated by the lex fori. Harker v. Brink, 24 N. J. Law, 333; General Steam Navigation Co. v. Guillon, 11 Meeson & Welsby, 877; Bullock v. Caird, L. R. 10 Q. B. 276; same case, 44 L. J. Q. B. 124. Our statute has provided a method of suing unincorporated associations by their recognized names, and we are not bound, even though it is permissible by way of comity, to follow one of the methods of procedure sanctioned by the New York statute, to the exclusion of the method of procedure provided by our own statute. Since it is not obligatory upon the plaintiff to bring his suit against the president or treasurer, it can make no difference, for the present purpose, whether we regard the defendant as an unincorporated organization (Chapman v. Barney, 129 U. S. 677, 9 Sup. Ct. 426, 32 L. Ed. 800; Great Southern Fireproof Hotel Co. v. Jones, 177 U. S. 449, 20 Sup. Ct. 690, 44 L. Ed. 482), a partnership with some of the powers of a corporation (People ex rel. Winchester v. Coleman, 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183), or as a corporation (Edgeworth v. Wood, 58 N. J. Law, 463, 33 Atl. 940; Tide Water Pipe Co. v. State Board of Assessors, 57 N. J. Law, 516, 31 Atl. 220, 27 L. R. A. 684; Id., 59 N. J. Law, 269, 39 Atl. 1114). If the defendant is an unincorporated organization or a partnership, with some of the powers of a corporation, it can be sued by its recognized name under section 40 of the practice act (P. L. 1903, p. 545). If it is a corporation, it can of course be sued by its corporate name, and whether that name is Adams Express Company, or "Levy C. Weir, President of the Adams Express Company," is of little consequence, if the summons has been actually served in the manner pointed out by the statute. The defect, if one existed, would be amendable. * * * I think the service of the summons was properly made if the defendant is an unincorporated organization. The same service would be effectual under section 88 of the corporation act (P. L. 1896, p. 305) if the defendant is a corporation. It can make no difference that the summons and declaration describe the defendant as an unincorporated organization. If it is in fact a corporation, these words may be rejected as surplusage.

The motion to set aside the summons is denied, with costs.[4]

[4]Affirmed on motion to vacate, Saunders v. Adams Express Co., 71 N. J. Law, 520, 58 Atl. 1101.

See Taft v. Ward, 106 Mass. 518 (1871); Edwards v. Warren Linoline & Gasoline Works, 168 Mass. 564, 47 N. E. 502, 38 L. R. A. 791 (1897).

In re Doetsch (1896) 2 Ch. 836, 839, Romer, J.: "Now, from the admissions before me—and there is no other evidence—it appears to me that the Spanish law only differs from the English law in a matter of procedure. The Spanish courts require that a joint creditor shall before he seeks to reach the estate of a deceased partner first proceed against and exhaust or prove the insolvency of the joint estate. In my opinion, that is a matter of procedure. It is clear that the Spanish firm was not a corporation. * * * The procedure of the Spanish courts does not bind the courts here; nor does the Spanish law at all affect the right of a creditor here to avail himself of the benefits given by the English courts in administering estates here. For that Bullock v. Caird, L. R. 10 Q. B. 276, is a sufficient authority."

HARTMAN v. LOUISVILLE & NASHVILLE RY. CO.

(St. Louis Court of Appeals, 1890. 39 Mo. App. 88.)

Action to enforce a common-law liability of defendant as common carrier for failure to deliver to the plaintiff goods which it had received from plaintiff's agent in Illinois to be shipped to plaintiff at St. Louis, Mo. The goods were destroyed while in transit by an accidental fire at East St. Louis, Ill. The defendant set up in his answer a special contract exonerating it from liability.[5]

THOMPSON, J.[6] * * * In any view which we may take of the question it is, therefore, clear that the validity and interpretation of the contract of affreightment, which the defendant sets up in its answer is governed by the laws of Illinois. * * *

The statute of Illinois, which was put in evidence, is as follows: "That whenever any property is received by a common carrier, to be transported from one place to another, within or without this state, it shall not be lawful for such carrier to limit his common-law liability, safely to deliver such property at the place to which the same is to be transported, by any stipulation or limitation expressed in the receipt given for such property." Hurd, Rev. St. Ill. 1874, c. 27, § 1. One of the decisions of the Appellate Court of Illinois, which was put in evidence by the plaintiff, shows that, under the law as settled in that state, "a common carrier can limit his ordinary liability only by a special contract, and the acceptance of a receipt or bill of lading, with printed conditions or notice limiting the carrier's liability, by the owner or shipper of goods, without dissent, will not establish such a contract It must be shown that the shipper knew of and assented to the exemption, and such assent must be shown by other and additional evidence, and is not the subject of presumption from the terms of the receipt alone." Western Transit Co. v. Hosking, 19 Ill. App. 607. Upon the question of what shall be regarded as evidence that the shipper assented to the conditions in the bill of lading or receipt, a decision of the Supreme Court of Illinois, also put in evidence by the plaintiff, is to the effect that evidence that the shipper, prior to the shipment in question, had filled out similar blank bills of lading for shipments which contained the same stipulation in relation to the property as the one in question, is admissible, as going to show knowledge of the provision in question and the shipper's assent thereto. Wabash, St. L. & P. Ry. Co. v. Jaggerman, 115 Ill. 407, 4 N. E. 641.

We must, therefore, hold that the stipulations in this contract of affreightment, limiting the common-law liability of the defendant, were void for want of assent, unless the question, what is to be deemed evidence of assent, is to be determined by the law of Missouri instead of the law of Illinois. We have met with a decision of the Supreme Ju-

[5] This brief statement of facts has been abstracted from the opinion.

[6] Only a part of the opinion is given.

dicial Court of Massachusetts* which is quite in point, to the effect that this question is to be determined by the law of Missouri. In that case goods were shipped from a place in Illinois to be delivered at a place in Massachusetts. They were destroyed by fire, while yet in the state of Illinois, in the hands of the transportation company. There was in the contract of affreightment, as in the case before us, a clause exonerating the carrier from liability in the case of a loss by fire. The plaintiff appealed to the rule of the law of Illinois, that the mere fact of the acceptance by the shipper of a contract of affreightment, containing such a stipulation, is not evidence of assent by him to its terms. By the law of Massachusetts (Grace v. Adams, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131), as by the law of Missouri (Snider v. Adams Express Co., 63 Mo. 376; O'Bryan v. Kinney, 74 Mo. 125; St. Louis, K. C. & N. Ry. Co. v. Cleary, 77 Mo. 634, 46 Am. Rep. 13), the reception by the shipper of a bill of lading containing such stipulations was evidence of his assent to them. There seems to have been in that case, as in this, no affirmative evidence other than the acceptance of the bill of lading of the shipper's assent to these stipulations. The question, therefore, was whether the particular stipulation was binding upon the plaintiff according to the law of Massachusetts, or whether it was no part of the contract, according to the law of Illinois. The Massachusetts court held that the question was to be determined by the law of Massachusetts, and that the stipulation was, therefore, binding. The court proceeded upon the view that the question did not relate to the validity or interpretation of the contract, so as to be determinable by the rule of lex loci contractus, but that it related to the remedy, and was, therefore, to be determined by the rule of the forum. In other words, the court treated it as a mere rule of evidence or procedure pertaining to the remedy upon a contract.

While the decisions of that state are entitled to great respect, we cannot assent to the soundness of this conclusion. The rule that matters pertaining to the remedy are governed by the forum always assumes that there is a contract upon which a remedy is sought. It cannot be properly appealed to, to determine the question of contract or no contract. The question for decision in that case, as in the case before us, was whether a certain stipulation in an instrument of writing was a binding contract.

The governing principle by which to determine that question was, not the rules of procedure of the forum, but a rule of universal application, laid down by Mr. Justice Story in the statement that all the formalities, proofs or authentications of contracts, which are required by the lex loci, are indispensable to their validity everywhere else. Story, Conflict of Laws, § 260. The same rule is laid down by another eminent writer on private international law, thus: "A contract, so far as concerns its formal making, is to be determined by the place where it is solemnized, unless the lex situs of the property disposed of other-

*Hoadley v. Northern Transp. Co., 115 Mass. 304, 15 Am. Rep. 106 (1874).

wise requires." Wharton, Conflict of Laws, § 401. The courts have gone so far as to hold that, although the parties intended that a certain instrument should be a contract between them, yet if the law of the place where it was made required it to be stamped, and it was not stamped, it would be void in the place where the remedy upon it was sought. Alves v. Hodgson, 7 T. R. 241; Clegg v. Levy, 3 Camp. 166; Satterthwaite v. Doughty, 44 N. C. 314, 59 Am. Dec. 554. But the rule cannot be made plainer by illustrations than it can by a mere statement of it. Many cases illustrating the rule are cited by Story and Wharton in support of their respective statements of it. The rule must of necessity apply to such a contract as the one before us; otherwise we should be involved in the solecism of holding that a piece of paper containing a stipulation, of no validity in the place where it was executed and delivered and where the general engagement evidenced by it was to be chiefly performed, becomes a contract in some other jurisdiction in which an action may chance to be brought upon it. The inconvenience of such a rule, as applicable to the facts before us, would be that a shipper in Illinois, accepting a bill of lading containing such a stipulation, must determine whether, by accepting it, he does not draw himself into a disadvantageous contract, not according to the law where the parties are when they make the contract, but according to the law of Missouri or Massachusetts or some other foreign jurisdiction where the contract may possibly become the subject of an action.

[The court thereupon held that there was no evidence that plaintiff had assented to the stipulation.][7]

[7] Pitcairn v. Philip Hiss Co. (1903) 125 Fed. 110, 113, 61 C. C. A. 657, Archbald, District Judge: "According to the modern and better view, the rule which prohibits the modification of a written contract by parol is a rule, not of evidence, but of substantive law. 21 A. & E. Enc. Law (2d Ed.) 1079; Thayer's Evidence, p. 390 et seq.; 1 Greenleaf, Evidence (16th Ed.) § 350a. Parol proof is excluded, not because it is lacking in evidentiary value, but because the law for some substantive reason declares that what is sought to be proved by it (being outside the writing by which the parties have undertaken to be bound) shall not be shown."

So as to whether an indorsement in blank can be modified by parol evidence. Baxter Nat. Bank v. Talbot, 154 Mass. 213, 28 N. E. 163, 13 L. R. A. 52 (1891). But see Downer v. Chesebrough, 36 Conn. 39, 4 Am. Rep. 29 (1869).

The form of action—e. g., whether it must be at law or in equity, Burchard v. Dunbar, 82 Ill. 450, 25 Am. Rep. 334 (1876); or whether it shall be assumpsit, covenant, or debt—is determined by the lex fori. Warren v. Lynch, 5 Johns. (N. Y.) 239 (1810); Trasher v. Everhart, 3 Gill & J. (Md.) 234 (1831); Bank of United States v. Donnally, 8 Pet. (U. S.) 361, 8 L. Ed. 974 (1834). For this purpose, the question whether an instrument is sealed or not has been held to be governed by the same law. Le Roy v. Beard, 8 How. (U. S.) 451, 12 L. Ed. 1151 (1850).

The lex fori decides whether the assignee of a chose in action can sue in his own name, Foss v. Nutting, 14 Gray (Mass.) 484 (1860); whether a married woman can be sued alone, or whether her husband must be joined, Robinson v. Queen, 87 Tenn. 445, 11 S. W. 38, 3 L. R. A. 214, 10 Am. St. Rep. 690 (1889); whether parties to a joint obligation can be sued severally, Fryklund v. Great Northern R. Co., 101 Minn. 37, 111 N. W. 727 (1907). It determines, also, the mode of continuing an action against a foreign corporation after its dissolution, Sturges v. Vanderbilt, 73 N. Y. 384 (1878);

McELMOYLE v. COHEN.

(Supreme Court of the United States, 1839. 13 Pet. 312, 10 L. Ed. 177.)

Certificate of division from the Circuit Court of Georgia. William McElmoyle, a citizen of the state of South Carolina, suing for the use of Isaac S. Bailey, also a citizen of that state, presented a petition, in 1835, to the Circuit Court of the United States for the District of Georgia, stating that Levy Florence had died intestate, and, having before his death resided in the state of South Carolina, he had obtained a judgment against him in the court of common pleas for the city of Charleston, for $9,687, on a promissory note, on the 16th day of February, 1822, which remained unsatisfied; an exemplification of which judgment in due form was exhibited to the court with the petition.

The defendant, a citizen of Georgia, to which state Levy Florence removed, after seven years from the rendition of the judgment, and in which state he resided at the time of his death, pleaded the statute of limitations of the state of Georgia, which, the plea alleged, limited such actions to five years from the cause of action; and he afterwards pleaded that there was no statute of the state of South Carolina which limited suits upon judgments therein to any particular time, nor was there any statute of limitations in that state applicable to judgments, but that a statute was passed by the Legislature of Georgia, on the 7th day of December, 1805, which provided and declared that all actions of debts on judgments obtained in courts other than the courts of Georgia should be commenced and prosecuted within five years from the rendition of such judgments, and not afterwards, and that for seven years after the rendition of the judgment on which the suit is brought, Levy Florence was a resident and citizen of the state of Georgia, and no suit on the judgment was commenced against him, nor for two years after the defendant, John J. Cohen, had been the duly qualified administrator of the said Levy Florence. The defendant, for further plea, stated that he had not funds of the estate of Levy Florence sufficient to pay the whole of the judgment, and to pay the other debts claimed as due from the estate.

Upon the trial of the cause, the following questions occurred, upon which the opinions of the judges were opposed; and the same were certified to the Supreme Court: (1) Whether the statute of limitations of Georgia can be pleaded to an action in that state, founded

and the question whether a pending action can be revived upon the death of either party, Baltimore & O. R. Co. v. Joy, 173 U. S. 226, 19 Sup. Ct. 387, 43 L. Ed. 677 (1899).

The lex fori governs ordinary presumptions of law. Johnson v. Chicago & N. W. Ry. Co., 91 Iowa, 248, 59 N. W. 66 (1894); Jones v. Chicago, St. P., M. & O. R. Co., 80 Minn. 488, 83 N. W. 446, 49 L. R. A. 640 (1900). It regulates the evidence requisite to make a prima facie case, Richmond & D. R. Co. v. Mitchell, 92 Ga. 77, 18 S. E. 290 (1893); or to submit a case to the jury, Ferguson v. Central R. Co. of New Jersey, 71 N. J. Law, 647, 60 Atl. 382 (1905).

upon a judgment rendered in the state of South Carolina? (2) Whether in the administration of assets in Georgia, a judgment rendered in South Carolina, upon a promissory note, against the intestate, when in life, should be paid in preference to simple contract debts?

WAYNE, J.[8] * * * Such being the faith, credit, and effect to be given to a judgment of one state in another, by the Constitution and the act of Congress, the point under consideration will be determined by settling what is the nature of a plea of the statute of limitations. Is it a plea that settles the right of a party on a contract or judgment, or one that bars the remedy? Whatever diversity of opinion there may be among jurists upon this point, we think it well settled to be a plea to the remedy; and, consequently, that the lex fori must prevail. Higgins v. Scott, 2 Barn. & Adolph. 413; 4 Cow. (N. Y.) 528, 530, note 10; Van Reimsdyk v. Kane, 1 Gall. (U. S.) 371, Fed. Cas. No. 16,871; Le Roy v. Crowninshield, 2 Mason, 151, Fed. Cas. No. 8,269; British Linen Com. v. Drummond, 10 Bar. & Cresw. 903; De La Vega v. Vianna, 1 Barn. & Adolph. 284; Decouche v. Savetier, 3 Johns. Ch. (N. Y.) 190, 8 Am. Dec. 478; Lincoln v. Battelle, 6 Wend. (N. Y.) 475; Gulick v. Loder, 13 N. J. Law, 68, 23 Am. Dec. 711; 3 Burge's Com. on Col. and For. Laws, 883. The statute of Georgia is: "That actions of debt on judgments obtained in courts, other than the courts of this state, must be brought within five years after the judgment obtained." It would be strange, if in the now well-understood rights of nations to organize their judicial tribunals according to their notions of policy, it should be conceded to them in every other respect than that of prescribing the time within which suits shall be litigated in their courts. Prescription is a thing of policy, growing out of the experience of its necessity; and the time after which suits or actions shall be barred, has been, from a remote antiquity, fixed by every nation, in virtue of that sovereignty by which it exercises its legislation for all persons and property within its jurisdiction. This being the foundation of the right to pass statutes of prescription or limitation, may not our states, under our system, exercise this right in virtue of their sovereignty? or is it to be conceded to them in every other particular than that of barring the remedy upon judgments of other states by the lapse of time? The states use this right upon judgments rendered in their own courts; and the common law raises the presumption of the payment of a judgment, after the lapse of twenty years. May they not, then, limit the time for remedies upon the judgments of other states, and alter the common law by statute, fixing a less or larger time for such presumption, and altogether barring suits upon such judgments, if they shall not be brought within the time stated in the statute? It certainly will not be contended that judgment creditors of other states shall be put upon a better footing, in regard to a state's right to legislate in this particular, than the judgment creditors of the

[8] Only a part of the opinion is given.

Robert E. Stone

state in which the judgment was obtained. And if this right so exists, may it not be exercised by a state's restraining the remedy upon the judgment of another state, leaving those of its own courts unaffected by a statute of limitations, but subject to the common-law presumption of payment after the lapse of twenty years? In other words, may not the law of a state fix different times for barring the remedy in a suit upon a judgment of another state, and for those of its own tribunals? We use this mode of argument to show the unreasonableness of a contrary doctrine. But the point might have been shortly dismissed with this sage declaration, that there is no direct constitutional inhibition upon the states, nor any clause in the Constitution from which it can be even plausibly inferred, that the states may not legislate upon the remedy in suits upon the judgments of other states, exclusive of all interference with their merits. It being settled that the statute of limitations may bar recoveries upon foreign judgments; that the effect intended to be given under our Constitution to judgments, is, that they are conclusive only as regards the merits; the common-law principle then applies to suits upon them, that they must be brought within the period prescribed by the local law, the lex fori, or the suit will be barred.

Counsel have relied, to establish a contrary doctrine, upon Morton & Co. v. Naylor, 1 Hill's Law (S. C.) 439. But that case was obviously decided upon a misconception of the learned judges of the decision of this court in the case of Mills v. Duryee, 7 Cranch, 481, 3 L. Ed. 411.

It is, therefore, our opinion, that the statute of limitations of Georgia can be pleaded to an action in that state, founded upon a judgment rendered in the state of South Carolina.

[In regard to the second question, it was held that, in the payment of the debts of a deceased party, a judgment of another state would enjoy such rank only as is assigned to it by the law of the forum.][9]

BYRNE v. CROWNINSHIELD.

(Supreme Judicial Court of Massachusetts, 1820. 17 Mass. 55.)

Assumpsit by the endorsee against the maker of sundry promissory notes, dated at New York, on the 29th day of March, 1811.

The defendant pleads the statute of limitations of the state of New York, in bar; and avers that, at the time when the supposed cause of action accrued to the plaintiff, the parties resided in and were citizens

[9] See Le Roy v. Crowninshield, 2 Mason, 151, Fed. Cas. No. 8,269 (1820); Townsend v. Jemison, 9 How. (U. S.) 407, 13 L. Ed. 194 (1850); and, in general, 48 L. R. A. 625–644; 4 L. R. A. (N. S.) 1029–1032.

The doctrine that the statute of limitations goes to the remedy was supported by the Dutch jurists P. Voet (De Statutis, § 10, c. 1, No. 1) and Ulticus Huber (De conflictu legum, No. 7).

of that state, and that the cause of action accrued, if at all, within the said state.

To this plea the plaintiff demurs, and the defendant joins in demurrer.

Nichols, for the plaintiff, cited and relied on the case of Pearsall v. Dwight, 2 Mass. 84, 3 Am. Dec. 35, as decisive of the question arising in the present action.

Cummings, for the defendant. I am to distinguish this case from the one cited for the plaintiffs; and it will be found to differ in one essential fact. In that case, the defendants were citizens and residents in Massachusetts, nor does it appear that they were ever within the state of New York. In the case at bar, the parties were all citizens of and residents in New York, at the time of making the contract and long after. If this court will ever recognize a statute of limitations enacted by another state they will give effect to the one pleaded in this case.

Nichols, in reply. The court considered the parties in Pearsall v. Dwight as inhabitants of New York, and the contract as made there. See Nash v. Tupper, 1 Caines (N. Y.) 402, 2 Am. Dec. 197; Smith v. Spinolla, 2 Johns. (N. Y.) 198; Jackson v. Dieffendorf, 3 Johns. (N. Y.) 269.

By The Court. The case cited by the plaintiff's counsel from our own Reports, is decisive of this action. The principle has often been recognized, that the laws of the country where the contract is made, are to govern its construction; those of the country where the remedy is sought, are to prescribe that remedy.

A difference has been attempted to be shown in this case, from that of Pearsall v. Dwight, in that both the parties to this action were inhabitants of New York at the time when the contract was made, and the cause of action accrued. But that fact was assumed in the case referred to. The difference then does not exist.

Defendant's plea bad.[10]

[10] For statutory modification of rule, see West v. Theis, 96 Pac. 932 (1908), and note on case in 22 Harv. L. Rev. 62.

As to when statute begins to run, see 15 L. R. A. (N. S.) 156–165.

The lex fori has been held to govern, also, certain preliminary matters—e. g., whether for the purpose of the statute of limitations an instrument is to be deemed a specialty or not, Bank of United States v. Donnally, 8 Pet. (U. S.) 361, 8 L. Ed. 974 (1834); and whether a person for such purpose has reached the age of majority, Burgett v. Williford, 56 Ark. 187, 19 S. W. 750, 35 Am. St. Rep. 96 (1892).

SHELBY v. GUY.

(Supreme Court of the United States, 1826. 11 Wheat. 361, 6 L. Ed. 495.)

The plaintiffs here were defendants in the court below.

The facts were as follows: One Dickerson, a citizen of Virginia, and grandfather of the plaintiff, was the owner of a female slave named Amy, from whom the slaves in question have descended. Upon the marriage of Thomas T. Guy with plaintiff's mother, Amy passed into his possession, having been sent to him by Dickerson. Whether it was by way of loan or parol gift was controverted.

From 1778 to 1794, Amy remained in Guy's possession and was then sold with her increase to David Shelby, defendant, who thereupon removed with the slaves to Tennessee where he resided until the beginning to this action.

In 1788, 10 years after Amy came into the possession of T. T. Guy, Dickerson willed the slaves to T. T. Guy for life with remainder to the testator's grandsons, John and Thomas Guy. The executory devise took effect by the death of their father in 1795. Shortly afterwards and before the bringing of this action John died. Neither brother had been in Tennessee until within three years prior to the institution of this suit, but had resided in Virginia.

Thomas Guy brought this action in Tennessee to recover the slaves there in possession of Shelby. Defendants below pleaded non detinet and the act of limitations of Tennessee.

The limitation to the action of detinue in Tennessee was three years with a saving clause in favor of nonresidents, while it was five years in the state of Virginia.

Plaintiff joined issue upon the plea of non detinet and filed a special replication to the plea of the statute, the object of which was to bring himself within the saving in favor of absentees. Defendants demurred to the replication, but the demurrer being overruled, they went to trial on the general issue, and verdict was rendered for plaintiff. Defendant thereupon sued out a writ of error to the Supreme Court of the United States.[11]

JOHNSON, J.[12] * * * The object of the defendants, in the several prayers for instructions propounded to the court, was to be let into proof of a title, without will or deed, in the father of T. T. Guy, from whom they purchased, and to maintain, that although that title was only derived to him by implication, under the limitation acts of Virginia, it was sufficient, not only to make out a defense by pleading, but by giving such facts in evidence as would be a good defence on a plea of the statute of limitations, if the suit were instituted in the state

[11] The statement of facts has been abstracted from the opinion.

[12] A part of the opinion has been omitted.

of Virginia, or to maintain detinue in a suit to recover in right of a possession under the statute in that state. With this view, they proposed to rely on the following propositions:

1. That the proof that Dickerson, on the marriage of Guy with his daughter, had sent the slave in question with them, or to them, upon their going to housekeeping, and permitted her to remain there ever after, as their property, without any specific declaration of the interest vested in them, other than the will of 1788, with a variety of corroborating facts, was sufficient to sustain an inference of a gift or transfer by parol, and of such an adverse possession as might constitute a bar under the act of limitations of Virginia of 1705. This the court refused, on the ground, that a parol gift of slaves in Virginia was, at the date of that transaction, absolutely void. * * *

And on this point, we think the court erred in rejecting the proof. For, although the gift may have been void or voidable, the fact of delivery of possession attended it, and this must have put the party to his action to reinstate himself in the enjoyment of the property. The limitation to the action of detinue in Virginia, is five years; and here the supposed donee proves a possession of ten years.

There can, then, be but one doubt raised on the right of the defendant to the instruction here prayed, and to the admission of the evidence offered to the fact of a parol gift, and that is, whether he could avail himself of this defence in this mode. In the case of Newby's Adm'rs v. Blakey, 3 Hen. & M. (Va.) 57, a case strikingly resembling this in its circumstances, it was adjudged, that a plaintiff in Virginia, may recover in detinue, upon five years' peaceable possession of a slave, acquired without force or fraud. And four months after that decision, and obviously without being apprised of it, this court, in the case of Brent v. Chapman, maintained the same doctrine (5 Cranch, 358, 3 L. Ed. 125).

It follows, we think, that, on the same principle, such a possession must constitute a good defence in Tennessee. To preclude the defendant from availing himself of the benefit of that evidence which would have sustained an action for the same property, by the person from which he purchased it, would be to convert a good and valid title in Virginia, into a defeasible title in Tennessee; a sufficient title in a vendor, into a defeasible title in his vendee; and, by an indirect operation, to make the seller liable, where a direct action could not have been maintained against him to recover the property sold. * * *[13]

[13] As to distinction between statutes of limitation affecting merely the remedy and those extinguishing the debt or claim, see Story, Conflict of Laws (8th Ed.) § 582b. This distinction was approved by Chief Justice Tindal in Huber v. Steiner, 2 Bing. N. C. 202, 211 (1835), and by Shipman, Circuit Judge, in Canadian Pac. R. Co. v. Johnston, 61 Fed. 738, 9 C. C. A. 587, 25 L. R. A. 470 (1894). See, also, Wynn v. Lee, 5 Ga. 217 (1848); Howell v. Hair, 15 Ala. 194 (1849); Alexander v. Torrence, 51 N. C. 260 (1858); Waters v. Barton, 41 Tenn. 450 (1860).

ARP v. ALLIS-CHALMERS CO.

(Supreme Court of Wisconsin, 1907. 130 Wis. 454, 110 N. W. 386, 8 L. R. A. [N. S.] 997, 118 Am. St. Rep. 1036.)

WINSLOW, J. This action was commenced August 10, 1904, and was brought by the plaintiff to recover damages for personal injuries suffered by the plaintiff while in the employ of the defendant as the result of an accident which happened at the defendant's shop in the city of Chicago, March 31, 1903. The defendant is a foreign corporation operating a manufacturing plant in Wisconsin, and on the 17th of September, 1901, had duly filed with the Secretary of State an instrument appointing a resident attorney in this state as required by section 4231, Rev. St. Wis. 1898. The defendant by answer pleaded as a defense that part of subdivision 5 of section 4222, Rev. St. Wis. 1898, which provides that no action to recover damages for personal injuries shall be maintained unless a written notice thereof containing certain prescribed statements shall be served on the person responsible for the injury within one year after the happening of the event. It was admitted on trial that no notice as required by said subdivision had been served, a verdict for the defendant was directed, and, from judgment thereon, the plaintiff appeals.

The controlling question presented is whether that part of section 4222 above referred to applies to a cause of action arising in another state when a resident of that state brings suit thereon against a resident of Wisconsin in a Wisconsin court. A few well-established principles seem to answer this question in the affirmative. The clause in question is a statute of limitations. Relyea v. Tomahawk Paper & Pulp Co., 102 Wis. 301, 78 N. W. 412, 72 Am. St. Rep. 878; O'Donnell v. City of New London, 113 Wis. 292, 89 N. W. 511; Meisenheimer v. Kellogg, 106 Wis. 30, 81 N. W. 1033; Lawton v. Waite, 103 Wis. 244, 79 N. W. 321, 45 L. R. A. 616; Gatzow v. Buening, 106 Wis. 1, 81 N. W. 1003, 49 L. R. A. 475, 80 Am. St. Rep. 1. True, its operation is somewhat different from the operation of other statutes of limitations in that it acts upon the time within which a preliminary notice shall be served instead of the time within which the summons shall be served, but it is none the less a limitation upon the right to maintain the action. Troschansky v. Milwaukee Electric R. & Light Co., 110 Wis. 570, 86 N. W. 156. It is the long-settled doctrine of this court that, when a statute of limitations has completely operated it extinguishes the right of action by taking away the remedy. Eingartner v. Illinois Steel Co., 103 Wis. 373, 79 N. W. 433, 74 Am. St. Rep. 871. In the absence of any saving clause our statutes of limitation operate against nonresident plaintiffs who bring actions in the courts of this state as well as against residents. Winter v. Winter, 101 Wis. 494, 77 N. W. 883; Fields v. Estate of Mundy, 106 Wis. 383, 82 N. W. 343, 80 Am. St. Rep. 39. Were the rule otherwise the result would

be that nonresident litigants coming into our courts to enforce a foreign cause of action would possess greater rights and privileges than citizens of our own state. They are entitled to the same rights and privileges, no more, no less. Eingartner v. Illinois Steel Co., 94 Wis. 70, 68 N. W. 664, 34 L. R. A. 503, 59 Am. St. Rep. 859. This does not mean that our statutes of limitations have any extraterritorial effect so far as foreign causes of action are concerned. They do not reach over into Illinois and extinguish a right of action arising there. It only means that the foreign right sought to be enforced in this state after our statute has run has ceased to exist so far as regards its enforcement in this state, although the right and all remedies to enforce it in the state of Illinois remain entirely unaffected. Of course, when a cause of action arising here between residents of Wisconsin is barred here the right is extinguished in all jurisdictions, but no one could reasonably claim that because it could not be enforced under the limitation laws of a sister state it is barred here.

So we hold that the provision in question is a limitation statute admitting of no exception; that it applies to both foreign and domestic causes of action; that it acts like any other statute of limitations, extinguishing the right in a domestic cause of action as to all jurisdictions, and extinguishing the right in a foreign cause of action sought to be enforced in this state by a nonresident as far as its enforcement in our courts is concerned. This accords with the decision of the trial court.

Judgment affirmed.

CHICAGO, R. I. & P. RY. CO. v. THOMPSON.

(Supreme Court of Texas, 1906. 100 Tex. 185, 97 S. W. 459, 7 L. R. A. [N. S.] 191.)

Action by C. B. Thompson against the Chicago, Rock Island & Pacific Railway Company and another. The Court of Civil Appeals affirmed a judgment in favor of plaintiff (93 S. W. 702), and defendants bring error.

WILLIAMS, J.[14] The defendant in error applied for and received from plaintiffs in error at Chickasha, Ind. T., employment in the capacity of brakeman. His application, which constitutes a part of the contract of employment, contained this stipulation: "In further consideration of my employment, I agree that if, while in the service of the said company, I sustain any personal injury, for which I shall or may make claim against said company for damages, I will within thirty days after receiving such injury, give notice in writing of such claim to the general claim agent of said company, at Chicago, for injuries occurring

[14] Only so much of the opinion is given as relates to the question whether the stipulation affected only the remedy.

in Illinois or Iowa, and to the general attorney of said company, at Topeka, for injuries occurring elsewhere on the system, which notice shall state the time, place, manner, and cause of my being injured, and the nature and extent of my injuries, and the claim made therefor, to the end that such claim may be fully, fairly, and promptly investigated; and my failure to give notice of such claim in the manner and within the time aforesaid shall be a bar to the institution of any suit on account of such injuries." He was afterwards, in Oklahoma Territory, hurt while performing his duties to plaintiffs in error under the contract, and brought this action and recovered the judgment before us for damages upon the ground that his injury resulted from the negligence of defendant in failing to exercise proper care in keeping its track in safe condition. At the trial the defendant offered in evidence the contract above stated, together with evidence to show that it was valid under the laws of the Indian Territory and of Oklahoma, and that the notice had not been given as agreed upon; all of which facts had been pleaded in the answer. This evidence was excluded upon the objections urged by the plaintiff. The Court of Civil Appeals held that this ruling was justified by article 3379 of the Revised Statutes of 1895 of this state, which provides: "No stipulation in any contract requiring notice to be given of any claim for damages as a condition precedent to the right to sue thereon shall ever be valid, unless such stipulation is reasonable, and any such stipulation fixing the time within which such notice shall be given at a less period than ninety days shall be void, and when any such notice is required, the same may be given to the nearest or any other convenient local agent of the company requiring the same. In any suit brought under this and the preceding article it shall be presumed that notice has been given, unless the want of notice is specially pleaded under oath."

The stipulation was regarded by the Court of Civil Appeals as affecting only the remedy, in analogy to the statute of limitations, and as being controlled by the law of the forum. The evident purpose of the stipulation was to secure notice to the employer of the claim of the servant that it was liable for an injury suffered by him in order that opportunity might be given for prompt investigation and ascertainment of the facts affecting the claim. Phillips v. Western Union Telegraph Co., 95 Tex. 643, 69 S. W. 63. It fixes no time within which suit must be brought after notice has been given, leaving the plaintiff free to sue within the time allowed by law. But it attaches to the failure to give the notice the effect of "a bar to the institution of any suit on account of such injuries." The bar is not to arise from lapse of time, merely, but from the failure to do that which the parties agreed on as essential to the right to have a determination by suit of the question of liability for the injury. Its effect, if enforced according to its terms, was either to prevent the accrual of liability, or to put an end to all further question of liability after the expiration of the prescribed time without notice. Whether it had the effect first mentioned, as contended

by plaintiffs in error, or the latter, as contended by defendant in error, is wholly immaterial to the present inquiry. In either view it acts upon the substantive rights of the parties, and not upon the mere mode and time of their enforcement in the courts. Had it been only an agreement, valid both in Oklahoma and in the Indian Territory, to fix a period within which suit must be brought, we should have the question, which we need not consider, whether the time so fixed or that prescribed by our statute of limitations would govern. Section 2, Wharton's Conflict of Laws (3d Ed.) p. 1434. The cases of Armstrong v. Galveston, H. & S. A. Ry. Co., 92 Tex. 117, 46 S. W. 33, and Burgess v. Western Union Telegraph Co., 92 Tex. 125, 46 S. W. 794, 71 Am. St. Rep. 833, cited by the Court of Civil Appeals, do not decide the question before us. In the Armstrong Case the contract was made in Texas, and was subject to our laws unless the fact that it was for an interstate shipment put it beyond their operation, and that was the question discussed. The contract in the Burgess Case was made in Louisiana; the law of which, presumed to be the same as that of this state, made it illegal. This is the gist of the decision, the court holding, as in the Armstrong Case, that it was in the power of the state Legislatures to make regulations applicable to contracts concerning interstate commerce. Neither case holds that the statute of this state applies to contracts made in other jurisdictions. Indeed, the Burgess Case holds that the contract there in question was governed by the law of Louisiana. * * *

For the error in excluding the evidence, the judgment is reversed, and the cause remanded.

DAVIS v. MILLS.

(Supreme Court of the United States, 1904. 194 U. S. 451, 24 Sup. Ct. 692, 48 L. Ed. 1067.)

Statement by Mr. Justice HOLMES:

This case came here on a certificate of which the following is the material portion:

"The plaintiff is a citizen of Montana, and the owner by assignment of three causes of action (for goods sold and on a promissory note) against the Obelisk Mining & Concentrating Company, a Montana corporation. The indebtedness of the company upon these causes of action accrued July 31, 1892, July 1, 1892, and December 12, 1892, respectively. The defendants are and always have been citizens and residents of Connecticut, and at all the times mentioned in the complaint were trustees of the said Obelisk Mining Company. The statutes of Montana provide that within twenty days from the 1st day of September every such company shall annually file a specified report, and that if it 'shall fail to do so, all the trustees of the company shall

be jointly and severally liable for all of the debts of the company then existing, and for all that shall be contracted before such report shall be made.' Section 460 of chapter 25 of the 5th division, Compiled Statutes of Montana, which was in force when the cause of action arose, re-enacted as section 451 of the Civil Code of Montana, which went into effect July 1, 1895.

"The Obelisk Company failed to file certain of the required reports, and the causes of action sued upon here, against the defendants as trustees, to recover debts of the company, accrued September 22, 1893, or prior thereto. This action was brought to enforce the joint and several liability of the defendants under the statute on July 30, 1897.

"When the cause of action accrued the Compiled Statutes of Montana contained these sections:

"'Sec. 45. 1. In an action for a penalty or forfeiture, when the action is given to an individual, or to an individual and the territory, except where the statute imposing it prescribes a different limitation; 2, an action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process shall be commenced within one year.'

"'Sec. 50. If, when the cause of action shall accrue against a person, he is out of the territory, the action may be commenced within the time herein limited, after his return to the territory; and if, after the cause of action shall have accrued, he depart from this territory, the time of his absence shall not be a part of the time limited for the commencement of the action.'

"Both of those sections were repealed by Code of Civil Procedure, § 3482, which went into effect July 1, 1895. On the last-named date the Civil Code of Montana went into effect, containing section 451, above cited. The Code of Civil Procedure contains a separate title, numbered II, and containing four chapters (sections 470 to 559), which deals exhaustively with 'the time of commencing actions.' It contains these sections:

"'Sec. 515. Within two years:

"'1. An action upon a statute for a penalty or forfeiture, "when the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation."'

"'Sec. 541. If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.'

"'Sec. 554. This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty of forfeiture attached or the liability created (sic).'

"Upon the facts above set forth, the question of law concerning which this court desires the instruction of the Supreme Court, for its proper decision, is:

"'May a defendant, in an action of the kind specified in section 554 of the Code of Civil Procedure of Montana, avail of the limitation therein prescribed, when the action is brought against him in the court of another state?'"

HOLMES, J.[15] The general theory on which an action is maintained upon a cause which accrued in another jurisdiction is that the liability is an obligatio, which, having been attached to the person by the law then having that person within its power, will be treated by other countries as accompanying the person when brought before their courts. But, as the source of the obligation is the foreign law, the defendant, generally speaking, is entitled to the benefit of whatever conditions and limitations the foreign law creates. Slater v. Mexican Nat. R. Co., 194 U. S. 120, 24 Sup. Ct. 581, 48 L. Ed. 900. It is true that this general proposition is qualified by the fact that the ordinary limitations of actions are treated as laws of procedure, and as belonging to the lex fori, as affecting the remedy only, and not the right. But in cases where it has been possible to escape from that qualification by a reasonable distinction, courts have been willing to treat limitations of time as standing like other limitations, and cutting down the defendant's liability wherever he is sued. The common case is where a statute creates a new liability, and in the same section or in the same act limits the time within which it can be enforced, whether using words of condition or not. The Harrisburg, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358. But the fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created, and accompanies the obligation everywhere. The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right.

If, then, the only question were one of construction and as to liabilities subsequently incurred, it would be a comparatively easy matter to say that section 554 of the Montana Code of Civil Procedure qualifies the liability imposed upon directors by section 451 of the Civil Code, and creates a condition to the corresponding right of action against them, which goes with it into any jurisdiction where the action may be brought. But the question certified raises greater difficulties both as to construction and as to power. We have first to consider whether section 554 purports to qualify, or to impose a condition upon, liabilities already incurred under the earlier act taken up into section 451. In doing so we assume that the word "directors" in the

[15] A part of the opinion has been omitted.

later act means the same as "trustees" in the earlier one. The contrary was not suggested. At the argument we were pressed with section 3455 of the Code of Civil Procedure: "No action or proceeding commenced before this Code takes effect, and no right accrued, is affected by its provisions." But the trouble made by this is more seeming than real. The following section deals specifically with limitations, and must be taken to override a merely general precaution against the disturbance of vested rights.

By section 3456: "When a limitation or period of time prescribed in any existing statute for acquiring a right or barring a remedy, or for any other purpose, has begun to run before this Code goes into effect, and the same or any limitation is prescribed in this Code, the time which has already run shall be deemed part of the time prescribed as such limitation by this Code." The language clearly imports that the limitations in the Code are to apply to existing obligations upon which the previous limitation already had begun to run. The result is that section 554 purports to substitute a three years' limitation for the one year previously in force, assuming that the previous one year limitation applied to this case, as under the decisions, it did. State Sav. Bank of Butte City v. Johnson, 18 Mont. 440, 45 Pac. 662, 33 L. R. A. 552, 56 Am. St. Rep. 591; National Park Bank v. Remsen, 158 U. S. 337, 342, 15 Sup. Ct. 891, 39 L. Ed. 1008, 1009. But if section 554 purported to make this substitution, it purported to introduce important changes. It lengthened the time on the one hand, but it took away the exception in case of absence from the state on the other. This last is disputed, but it seems to us a part of the meaning of the words "This title does not affect actions against directors," etc. The section as to absence from the state is a part of the title, and whatever necessary exceptions may be made from the generality of the words quoted, this is not one of them.

A further difference is that, while there might be difficulties in construing the general limitation upon actions for penalties as going to the right, this section is so specific that it hardly can mean anything else. We express no opinion as to the earlier act, but we think that this section 554 so definitely deals with the liability sought to be enforced that, upon the principles heretofore established, it must be taken to affect its substance so far as it can, although passed at a different time from the statute by which that liability first was created. We do not go beyond the case before us. Different considerations might apply to the ordinary statutes as to stockholders. We express no opinion with regard to that.

[The learned justice thereupon discussed and upheld the constitutionality of the law.]

The question is answered in the affirmative, and it will be so certified.[16]

[16] As to maintenance of an action on a bond for a deficiency arising from the foreclosure of a mortgage on real estate in another jurisdiction, where a par-

AYER v. TILDEN.

(Supreme Judicial Court of Massachusetts, 1860. 15 Gray, 178, 77 Am. Dec. 355.)

Action of contract upon the following promissory note, made and indorsed by defendants: "$670.81. New Lebanon, N. Y., 20th June, 1857. Six months after date we promise to pay to ourselves six hundred and seventy dollars and eighty-one cents, value received, at Bank of America, N. Y. Tilden & Co." [17]

HOAR, J.[18] * * * The defence of usury failing, the plaintiffs are entitled to recover, according to the agreement of parties, the principal of the note, with interest at such a rate as the law will allow. That rate will be six per cent. from the maturity of the note. The interest is not a sum due by the contract, for by the contract no interest was payable, and is not therefore affected by the law of the place of the contract. It is given as damages for the breach of contract, and must follow the rule in force within the jurisdiction where the judgment is recovered. Grimshaw v. Bender, 6 Mass. 157; Eaton v. Mellus, 7 Gray, 566; Barringer v. King, 5 Gray, 12. The contrary rule has been held to be applicable where there was an express or implied agreement to pay interest. Winthrop v. Carleton, 12 Mass. 4; Von Hemert v. Porter, 11 Metc. 210; Lanusse v. Barker, 3 Wheat. (U. S.) 147, 4 L. Ed. 343.

Perhaps it would be difficult to support the decision in Winthrop v. Carleton upon any sound principle; because the court in that case held that interest could only be computed from the date of the writ,

ticular mode of procedure is prescribed, see Sea Grove Building & Loan Ass'n v. Stockton, 148 Pa. 146, 23 Atl. 1063 (1892); Stumpf v. Hallahan, 101 App. Div. 383, 91 N. Y. Supp. 1062 (1905), affirmed 185 N. Y. 550, 77 N. E. 1196 (1906).

SET-OFF.—Whether or not a valid claim can be set up by way of set-off or counterclaim is uniformly held to be a matter of procedure, governed by the lex fori. Gibbs v. Howard, 2 N. H. 296 (1820); Davis v. Morton, 5 Bush (Ky.) 160, 96 Am. Dec. 345 (1868).

The very nature of the contract may exclude the idea of set-off; e. g., in the case of negotiable paper. See Stevens v. Gregg, 89 Ky. 461, 12 S. W. 775 (1890); Pritchard v. Norton, 106 U. S. 124, 133, 1 Sup. Ct. 102, 27 L. Ed. 104 (1882).

EXEMPTION LAWS.—"Exemption laws are not a part of the contract. They are a part of the remedy, and subject to the law of the forum." McKenna, J., in Chicago, R. I. & P. R. Co. v. Sturm (1899) 174 U. S. 710, 717, 19 Sup. Ct. 797, 43 L. Ed. 1144. Accord: Mineral Point R. Co. v. Barron, 83 Ill. 365 (1876); National Tube Co. v. Smith, 57 W. Va. 210, 50 S. E. 717, 1 L. R. A. (N. S.) 195, 110 Am. St. Rep. 771 (1905). Contra: Drake v. Lake Shore & M. S. Ry. Co., 69 Mich. 168, 37 N. W. 70, 13 Am. St. Rep. 382 (1888). But courts may enjoin citizens of their state from proceeding in other states in evasion of the exemption laws of their own state. Keyser v. Rice, 47 Md. 203, 28 Am. Rep. 448 (1877). See, also, Singer Mfg. Co. v. Fleming, 39 Neb. 679, 58 N. W. 226, 23 L. R. A. 210, 42 Am. St. Rep. 613 (1894).

[17] This statement of facts has been substituted for that of the original report.

[18] Only so much of the opinion is given as relates to the question of damages.

thus clearly showing that it was not considered as due by the contract, and yet adopted the rate of interest allowed at the place of the contract. But the error would seem to be in not treating money, paid at the implied request of another, as entitled to draw interest from the time of payment.

An objection to adopting the rule of the rate of interest in the jurisdiction where the action is brought as the measure of damages may be worthy of notice, that this rule would allow the creditor to wait until he could find his debtor or his property within a jurisdiction where a much higher rate of interest was allowed than at the place of the contract. But a debtor could always avoid this danger by performing his contract; and the same difficulty exists in relation to the actions of trover and replevin.

If such a case should arise, it might with more reason be argued that the damages should not be allowed to exceed those which would have been recovered in the state where the contract was made and to be performed.[19]

KAVANAUGH v. DAY.

(Supreme Court of Rhode Island, 1873. 10 R. I. 393, 14 Am. Rep. 691.)

DURFEE, J.[20] Interest upon a contract for the payment of money, where it is payable as interest by the terms of the contract, is to be paid according to the law of the place where the contract is made, unless it is elsewhere to be performed. The bonds, secured by the mortgage here in suit, were made in New York, between parties resident there, and, as they make no provision for payment elsewhere, were presumably to be paid in New York. Accordingly interest on them, if payable as interest, would have to be paid at the legal rate in New York,—the fact that they are secured by a mortgage of real estate in Rhode Island being ineffectual to vary the rule. De Wolf v. Johnson, 10 Wheat. (U. S.) 367, 6 L. Ed. 343; Lockwood v. Mitchell, 7 Ohio St. 387, 70 Am. Dec. 78; Varick v. Crane, 4 N. J. Eq. 128; Dolman v. Cook, 14 N. J. Eq. 56; Cotheal v. Blydenburgh, 5 N. J. Eq. 17; Stapleton v. Conway, 3 Atk. 727.

The interest, however, is payable not as interest, there being no stipulation for interest in the bonds, but as damages for the non-payment of the bonds at their maturity; and the counsel for the defendants contends that, where interest is to be paid as damages, it is

[19] So as to interest upon a foreign judgment. Clark v. Child, 136 Mass. 344 (1884); Wells, Fargo & Co. v. Davis, 105 N. Y. 670, 12 N. E. 42 (1887). Contra: Thompson v. Monrow, 2 Cal. 99, 56 Am. Dec. 318 (1852).

As to damages in general, see 91 Am. St. Rep. 714–743, 56 L. R. A. 301–316.

[20] Only the opinion of the court rendered upon the respondent's exceptions to the master's report under the decree of foreclosure is given.

to be computed at the rate established by the law of the place where the suit is brought, and not at the rate established by the law of the place where the contract was made or to be performed. The cases cited show that such is the rule in Massachusetts. Ayer v. Tilden, 15 Gray (Mass.) 178, 77 Am. Dec. 355; Ives v. Farmers' Bank, 2 Allen (Mass.) 236. The case of Cooper v. Waldegrave, 2 Beav. 282, does not show that such is the rule in England. In that case, the question was at what rate interest was payable on three bills of exchange, drawn in Paris and there accepted, but payable in London. No particular rate of interest was stated to be payable on the face of the bills. The holder of the bills, in a suit in England against the acceptor, claimed interest at six per cent., the legal rate in France. The court decided that English interest, at the rate of five per cent., should be paid. The reason given for the decision was, that interest was given as compensation for nonpayment in England and for the delay suffered there, and that the law of the place where the default happened must govern the allowance of interest arising out of the default. The inference is, that if the default had happened in another place, the interest would have been allowed at the rate established by the law of such other place.

In Gibbs v. Fremont, 9 Exch. 24, a bill of exchange, on the face of which no interest was reserved was drawn in California upon a drawee at Washington, and protested for nonacceptance. In an action by the indorsee against the drawee, in the Court of Exchequer in England, the plaintiff recovered interest, by way of damages, at the rate of twenty-five per cent., being the rate payable in California. The question considered was whether the plaintiff should have interest at the rate current in Washington or in California, no claim even being advanced that only the much lower English rate was to be paid. The court followed the decision in Allen v. Kemble, 6 Moore, P. C. 314, in which it was said that the drawer of a bill of exchange "is liable for payment of the bill, not where the bill was to be paid by the drawee, but where he, the drawer, made his contract, with such interest, damages, and costs as the law of the country where he contracted may allow." See, also, Ekins v. East India Company, 1 P. Wms. 395, and 1 Eq. Cas. Abr. 288 (E).

In Peck v. Mayo, 14 Vt. 33, 39 Am. Dec. 205, the defendants were sued in Vermont as indorsers of a promissory note, drawn in Canada, indorsed in Vermont, and payable in New York, at a day certain, without interest reserved. The court held that interest was recoverable as damages at the rate of seven per cent., being the New York rate, and one per cent. higher than the rate in Vermont or Canada. The ground of the decision was that the defendants had made default in New York, the view of the court differing in that respect from the view which was taken in Gibbs v. Fremont. The language used by Justice Redfield, in delivering the opinion of the court, was, that on a contract to pay money at a certain time and place, where no

interest is reserved, and there is a delay of payment, "interest, by way of damages, shall be allowed according to the law of the place of payment, where the money may be supposed to have been required by the creditor for use, and where he might be supposed to have borrowed money to supply the deficiency thus occuring, and to have paid the rate of interest of that country." This view is supported by many other cases. Foden v. Sharp, 4 Johns. (N. Y.) 183; Beckwith v. Trustees of Hartford, P. & F. R. Co., 29 Conn. 268, 76 Am. Dec. 599; Cowqua v. Lauderbrun, 1 Wash. C. C. (U. S.) 521, Fed. Cas. No. 3,-299; Jaffray v. Dennis, 2 Wash. C. C. (U. S.) 253, Fed. Cas. No. 7,-171; Evans v. White, Hempst. 296, Fed. Cas. No. 4,572a; Pauska v. Daus, 31 Tex. 67, 73; McAllister v. Smith, 17 Ill. 328, 65 Am. Dec. 651.

We think the rule which allows interest according to the law of the place where default is made, in a case where interest is recoverable as damages, is the more reasonable rule, and the rule which is best supported by authority; and that, where no special rate is reserved, there is no distinction which can justly affect the rate to be recovered, between interest recoverable as interest and interest recoverable as damages.

The exception is overruled.

ATWOOD v. WALKER.

(Supreme Judicial Court of Massachusetts, 1901. 179 Mass. 514, 61 N. E. 58.)

Action by D. Preston Atwood against Kate N. Walker for breach of contract to convey a certain piece of land. From a judgment in favor of plaintiff, defendant excepts.

LATHROP, J.[21] * * * The second and third instructions requested may be considered together, and were as follows: "(2) If the jury find that the contract for the sale of the real estate was made in New York, and to be executed there, and the defendant, believing herself to have a good title, agreed to convey the same, believing that she was able so to do, the plaintiff can recover no damages except his reasonable counsel fees for examining title and necessary expenses connected therewith. (3) If the contract was made in New York by the defendant, and to be executed there, and was made by her in good faith, the contract price is conclusive; and the plaintiff, having paid nothing, can recover nothing." The presiding judge refused to rule as requested, but instructed the jury that, if the contract was made, and the defendant failed to carry it out, or refused so to do, by reason of inability to give a good title, the plaintiff could recover the amount, if any, by which the fair market value of the real estate exceeded, if

[21] A part of the opinion has been omitted.

any, the purchase price. The jury found for the plaintiff in the sum of $7,271. The defendant's exceptions are not only to the refusal to rule as requested, but also to the ruling given. It is apparent from the amount of the verdict that, if there was error on the part of the judge, the defendant has a very substantial grievance.

The first question is as to the law of New York, and this is to be determined from the authorities put in evidence by the defendant, the plaintiff having put in no evidence on this subject. An examination of the authorities cited shows that in New York, in an action for breach of an agreement to convey land, if the defendant has acted in good faith, believing that he had a good title, and he is unable to convey on account of a defect in his title, only nominal damages can be recovered. Baldwin v. Munn, 2 Wend. (N. Y.) 399, 20 Am. Dec. 627; Peters v. McKeon, 4 Denio (N. Y.) 546; Conger v. Weaver, 20 N. Y. 140; Margraf v. Muir, 57 N. Y. 155; Cockcroft v. New York & H. R. Co., 69 N. Y. 201. Where the vendee has paid the purchase money in whole or in part, so much as is paid may be recovered back. Fletcher v. Button, 6 Barb. (N. Y.) 646. So, too, the vendee may recover for the expense of examining the title, if any such expense has been incurred. Northridge v. Moore, 118 N. Y. 419, 23 N. E. 570. If, however, a person contracts to sell lands which he knows at the time he has not the power to sell and convey, he is liable to make good to the vendee the loss of his bargain; and it does not excuse the vendor that he may have acted in good faith, and believed, when he entered into the contract, that he would be able to procure a good title for his purchaser. Pumpelly v. Phelps, 40 N. Y. 59, 100 Am. Dec. 463. There is nothing in this case to show that the defendant acted in bad faith, or that she knew of the defect in her title. The second request states the law in New York with substantial accuracy, as we understand the facts of the case. The third request states the law in New York too broadly. The New York decisions follow the English rule as laid down in Flureau v. Thornhill, 2 W. Bl. 1078, Bain v. Fothergill, L. R. 6 Exch. 59, and L. R. 7 H. L. 158, and in other cases. The English and the New York rule differs from that which generally prevails in this commonwealth. Roche v. Smith, 176 Mass. 595, 598, 58 N. E. 152, 51 L. R. A. 510, 79 Am. St. Rep. 345.

The contract for breach of which damages are sought in this case was made in New York, and was to be performed there. The land is situated in Massachusetts, and the action is brought here. The question, then, arises whether the damages are to be assessed according to the lex fori, the lex rei sitæ, or the lex loci contractus. As to the lex fori, the general rule is that all matters touching the remedy and the mode of procedure, including the admission of evidence and the probative force of evidence, are to be governed by the lex fori, with some exceptions. See Minor, Confl. Laws, § 205 et seq. So, where interest is allowed as damages for delay, and not as a part of the contract, it has been held that the amount to be allowed depends upon the lex

fori. Barringer v. King, 5 Gray (Mass.) 9; Ayer v. Tilden, 15 Gray, 178, 77 Am. Dec. 355; Hopkins v. Shepard, 129 Mass. 600; Clark v. Child, 136 Mass. 344. See, however, Ex parte Heidelback, 2 Low. 526, Fed. Cas. No. 6,322. As to the lex rei sitæ, it may be said that it governs in many respects. It has this effect as to the title and seisin; and a deed or will made in one state, purporting to convey or transfer land in another, must be in the form and according to the formalities prescribed by the law of the latter state. But the distinction between a conveyance of land and a covenant to convey land was pointed out and enforced in Polson v. Stewart, 167 Mass. 211, 45 N. E. 737, 36 L. R. A. 771, 57 Am. St. Rep. 452, and it was held that a covenant between a husband and wife, valid in the state where it was made, but which would have been invalid if made in this commonwealth, might be enforced here. So, in Glenn v. Thistle, 23 Miss. 42, where a contract was made in one state for the purchase of land lying in another, and the money was to be paid in the state in which the contract was made, it was held that the lex rei sitæ governed as to the title of the land, and the lex loci contractus as to the effect of a failure of consideration. See, also, Pritchard v. Norton, 106 U. S. 124, 1 Sup. Ct. 102, 27 L. Ed. 104.

It is a general rule that in all that relates to the nature, validity, and interpretation of a contract the lex loci contractus governs, and that contracts are presumed to be made with reference to the law of the place where they are entered into, unless they are entered into with reference to the law of some other state or country. See Baxter Nat. Bank v. Talbot, 154 Mass. 213, 216, 28 N. E. 163, 13 L. R. A. 52, and cases cited. So the lex loci contractus governs in all matters relating to the substantive rights of the parties. Minor, Confl. Laws, §§ 305–308; Pritchard v. Norton, 106 U. S. 124, 1 Sup. Ct. 102, 27 L. Ed. 104. The rights which are given by a contract, and which become fixed and definite immediately upon a breach of the contract, as a necessary result of giving the contract its true meaning and effect, are of a different kind from damages given for delay; and these rights will be enforced by a foreign jurisdiction, if there is nothing in them against its views of public policy.

In the present case the New York contract was to convey a certain piece of land. Its meaning and effect, according to the law applicable to it, is that the defendant, acting in good faith, if it turns out that she is unable to make a good title, will not give to the plaintiff the profits of his bargain, but will save him from loss, and put him in as good a position as if the contract had not been made. This is the true interpretation of the contract, reading it in connection with the law that determines its effect. The contract cannot be made a different contract, or given a greater effect, by bringing an action upon it in another jurisdiction. The rights of the parties are fixed by the writing and the law by which it is to be interpreted. When the breach occurred, the details of the damages were immediately fixed

by the writing, the law, and the conditions then existing. When the present action was brought, it was to recover the damages due under the contract. These damages grew out of a contract and transactions which had been concluded in New York, and were the cause of action on which the plaintiff seeks to recover here. There is nothing in our procedure, or in our mode of administering remedies, that can make these damages more or less. See Ayer v. Tilden, 15 Gray (Mass.) 178, 184, 77 Am. Dec. 355, per Hoar, J.; Ex parte Heidelback, 2 Low. 526, 530, Fed. Cas. No. 6,322.

We are of opinion, therefore, that the rule of damages adopted at the trial was wrong, and that the order must be: Exceptions sustained.

DORR CATTLE CO. v. DES MOINES NAT. BANK.

(Supreme Court of Iowa, 1904. 127 Iowa, 153, 98 N. W. 918, 102 N. W. 836.)

LADD, J.[22] In this action the plaintiff demands damages to credit alleged to have been caused by the malicious prosecution of attachment proceedings in Cook county, Ill. * * *

The only damages allowed were such as resulted from the supposed injury to plaintiff's credit. Was this a proper element of damages to be taken into consideration? In the early case of Campbell v. Chamberlain, 10 Iowa, 337, this court announced the rule that in an action on an attachment bond "injuries to credit or character or business are too remote and speculative to be considered in an action of this kind." This rule has since prevailed in this state. Lowenstein v. Monroe, 55 Iowa, 82, 7 N. W. 406; Mitchell v. Harcourt, 62 Iowa, 349, 17 N. W. 581; Tisdale v. Mayor, 106 Iowa, 1, 75 N. W. 663, 68 Am. St. Rep. 263. Some expressions in Thomas v. Isett, 1 G. Greene (Iowa) 470, were disregarded in subsequent decisions. The rule is also in harmony with the weight of authority. Crymble v. Mulvaney, 21 Colo. 203, 40 Pac. 499; Seattle Crockery Co. v. Haley, 6 Wash. 302, 33 Pac. 650, 36 Am. St. Rep. 156; Elder v. Kulner, 97 Cal. 490, 32 Pac. 563; Union Nat. Bank of Chicago v. Cross, 100 Wis. 174, 75 N. W. 992; State v. Thomas, 19 Mo. 613, 61 Am. Dec. 580; Holliday v. Cohen, 34 Ark. 707; 2 Sutherland on Damages (3d Ed.) § 512. The reason uniformly given is that such damages are too remote, uncertain, and speculative for estimation. * * *

The cause of action, however, arose in Illinois, and, as noted, a different rule prevails there. In Lawrence v. Hagerman, 56 Ill. 68, 8 Am. Rep. 674, though attachment bond had been given, suit was brought independent of the bond, and recovery allowed for damages resulting to the defendant's business credit and reputation from maliciously suing out the attachment without probable cause. Appellee

[22] A part of the opinion has been omitted.

insists that this right to recover compensatory damages for loss of credit is a part of the cause of the action, and should be recognized by the courts of this state. Appellant argues that the measure of damages pertains to the remedy, and therefore the lex fori should control. It is not questioned but that, if liable under the lex loci delicti, the defendant ought to be held liable here. The right to sue for the tort, the liability of the perpetrator, and the defenses that he may plead are, with few exceptions, governed by the law of the place. Minor on Conflict of Laws, §§ 196, 197; 22 Am. & Eng. Ency. of Law, 1378, et seq. It is likewise held that matters of procedure and the remedy to be applied are to be determined by the law of the forum. Minor on Conflict of Laws, § 225; Savary v. Savary, 3 Iowa, 271; Shaffer v. Balander, 4 G. Greene, 201. But it is often difficult to discern whether a particular inquiry relates to the remedy or is a substantive right. The wrong inflicted, or the right invaded, on which the action is based, must not be confused with the redress which the law affords. For every wrong there is a remedy, says the maxim. "The principal, and for the most part the only, available remedy which the law can give is an award of money, estimated as an equivalent for the damages suffered." Cooley on Torts, 64. Indeed, "every action is brought to obtain some particular result, which is termed a remedy." Cohen v. Virginia, 6 Wheat. (U. S.) 407, 5 L. Ed. 275. The act complained of is always to be diagnosed in the light of the law of the place where committed, and its character determined according to that law; but the particular kind of and the extent of the remedy to be applied necessarily depends on the notions of justice entertained by the forum by which it is to be administered. The rule is like that pertaining to contracts. The lex loci determines their validity and meaning, but, when found valid, and the true interpretation ascertained, the law of the forum steps in, and declares the time, mode, and extent of the remedy. Sherman v. Gassett, 9 Ill. 521; Arnold v. Potter, 22 Iowa, 194; Hazel v. Chicago, M. & St. P. Ry. Co., 82 Iowa, 477, 48 N. W. 926. The wrong averred in the instant case was suing out the writ of attachment without probable cause, and with a malicious intent, and causing it to be levied. This constituted a cause of action in Illinois, precisely as it would have in Iowa. Tallant v. Burlington Gaslight Co., 36 Iowa, 262; Frantz v. Hanford, 87 Iowa, 469, 54 N. W. 474. Carraher v. Allen, 112 Iowa, 168, 83 N. W. 902; Smeaton v. Cole, 120 Iowa, 368, 94 N. W. 909. "The cause of action is the right claimed or the wrong suffered by the plaintiff on the one hand, and the duty or delict of the defendant on the other; and these appear by the facts of each separate case." Box v. Chicago, R. I. & P. Ry. Co., 107 Iowa, 660, 78 N. W. 694. See Van Patten v. Waugh, 122 Iowa, 302, 98 N. W. 119. The only injury suffered by the cattle company, if any, was in its credit, and for present purposes this may be conceded part of the cause of action. Up to this point the lex loci is determinative of the legal effects and incidents of what was done.

Nothing is left save to administer the remedy, and under all authorities the character and extent of the remedy is governed by the law of the forum, save where the remedy has been created inferentially or directly with the right by statute and has become a part of it. See Northern Pac. Ry. Co. v. Babcock, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. Ed. 958; Minor on Conflict of Laws, § 199; Higgins v. Central N. E. & W. R. Co., 155 Mass. 176, 29 N. E. 534, 31 Am. St. Rep. 544; Leonard v. Columbia Steam Nav. Co., 84 N. Y. 48, 38 Am. Rep. 491; Herrick v. Minneapolis & St. L. Ry. Co., 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771; Knight v. West Jersey R. Co., 108 Pa. 250, 56 Am. Rep. 200; 22 Am. & Eng. Ency. of Law, 1387. Thus, when an action was brought in New York for causing the death of intestate in Pennsylvania, the court held that, as the amount of damages to be allowed in the latter state was not limited, no more than authorized by statute in the former could be recovered. Wooden v. Western N. Y. & P. R. Co., 126 N. Y. 10, 26 N. E. 1050, 13 L. R. A. 458, 22 Am. St. Rep. 803. In Higgins v. Central N. E. & W. R. Co., 155 Mass. 176, 29 N. E. 534, 31 Am. St. Rep. 544, the action was based on a wrong committed in Connecticut, resulting in death, and the court assumed that in bringing suit in Massachusetts the plaintiff waived the right to recover exemplary damages not allowed there, but which would have been included had the action been tried in Connecticut. In Evey v. Mexican Cent. Ry. Co., 81 Fed. 294, 26 C. C. A. 407, 38 L. R. A. 387, the injury was suffered in Mexico, and, though damages peculiar to social position were allowable under the Mexican statute, they might be omitted in Texas. In one portion of the opinion the court remarked: "Our opinion in this branch of the case is that the difference in the mode of arriving at and administering the damages is a matter which affects the remedy only." See, also, Mexican Nat. Ry. Co. v. Jackson, 89 Tex. 107, 33 S. W. 857, 31 L. R. A. 276, 59 Am. St. Rep. 28. Says Minor in his work on Conflict of Laws: "Occasionally some point may arise under differences between the lex delicti and the lex fori as to the elements to be taken into consideration in estimating the amount of damage. Such matters pertain to the remedy, and are to be controlled by the lex fori, since they do not involve any substantive right." The statement in the American notes to Dicey on Conflict of Laws that "the lex loci delicti determines, in effect, * * * the amount of damages that may be recovered," is not in point, for the author had in mind statutory torts, as the decisions cited clearly show.

A similar statement will be found in the third volume of Beale's Cases on Conflict of Laws, at page 521, in support of which two cases are cited: Meyer v. Estes, 164 Mass. 457, 41 N. E. 683, 32 L. R. A. 283, and Louisville R. Co. v. Whitlow's Adm'r, 19 Ky. 1931, 43 S. W. 711, 41 L. R. A. 614. The former is not in point, as the action was based on a contract to be performed in Massachusetts, the state of the forum. The latter was an action for the wrongful death of

a human being in Tennessee, the right to recover for which had been created by the statutes of that state. * * *

In the instant case no right created by statute was asserted to have been violated. The rules of the common law alone were invoked. These obtain with equal force in Illinois, Iowa, and other states. They have been adopted, in so far as applicable, from the same common source, and must necessarily be assumed to be the same everywhere. Mistakes in interpretation may be made, but the principles of justice go on forever. Every court will determine for itself what these may be as found in the common law. Franklin v. Twogood, 25 Iowa, 520; National Bank v. Greene, 33 Iowa, 140; Johnson v. Ry., 91 Iowa, 248, 59 N. W. 66; 6 Am. Eng. Enc. of Law (2d Ed.) 283. As said in Ruhe v. Buck, 124 Mo. 178, 27 S. W. Rep. 412, 25 L. R. A. 178, 40 Am. Dec. 439: "The spirit of comity does not require that a non-resident shall be allowed a remedy which is, by the policy of the state law, denied to its own citizens." According to the decisions of this court, damages resulting from injury to credit are too remote, uncertain, and speculative for allowance. The Supreme Court of Illinois has held otherwise, but, with all due respect for that eminent tribunal, we have felt constrained to adhere to our former conclusion, the effect of which is to denounce the ruling of that court, allowing such damages, as erroneous and contrary to the principles of justice as administered at the common law. Shall this court stultify its notions of justice by awarding a recovery contrary to what it conceives the principles of justice require, merely because the injury occurred across our borders instead of within the state? Because the injury occurred in Illinois, are the damages any less remote, uncertain, and speculative? The decisions of neither state purport to allow damages of this character, and what are such are for the court of this state to determine. Necessarily involved in the administration of the remedy are the elements to be considered in determining what it shall be. The effects of the wrong and injury are to be ascertained, but for the sole purpose of so advising the court as to enable it to apply the balm of adequate reparation. The nature and extent of the wrong, everything relating to its essence, is one thing; the consequences which naturally flow from it quite another. The right of recovery depends on the former; the remedy to be applied, and its extent, upon the latter; and the law of the forum necessarily determines what consequences shall be taken into consideration in fixing upon the remedy, for these inhere in that to be applied. It follows that, though the law may presume damages resulted from the injury, these in the instant case were so remote, uncertain, and speculative in character as not to permit of estimation, and nominal charges only should have been allowed. * * *[23]

Reversed.

[23] CONTINENTAL LAW.—The rule that matters relating to the remedy are to be determined by the lex fori, while recognized, has a much more restrict-

ed sphere of application than it has in England or in the United States. Much of what our courts deem to relate to the remedy, is held on the continent to go to the substance; for example, questions relating to the burden of proof. *France*, App. Rouen, July 25, 1906 (35 Clunet, 382); *Italy*, article 10, Prel. Disp. Civ. Code; *Germany*, 6 R. G. 412 (April 17, 1882). So as to the mode of proof. *France*, Cass. June 14, 1899 (S. 1900, 1, 225); Cass. May 23, 1892 (S. 1892, 1, 521); *Italy*, article 10, Prel. Disp. Civ. Code. So as to set-off. *France*, Trib. Civ. Nancy, March 25, 1890 (18 Clunet, 923); *Germany*, 26 R. G. 66 (July 1, 1890). So as to the statute of limitations. *France*, Cass. May 19, 1884 (S. 1885, 1, 113); Cass. Jan. 13, 1869 (S. 1869, 1, 49), and note by J. E. Labbé; App. Alger, Aug. 18, 1848 (D. 1849, 2, 130); App. Rennes, Jan. 7, 1908 (35 Clunet, 1101); *Germany*, 6 R. G. 24 (Jan. 17, 1882); 2 R. G. 13 (May 18, 1880); *Italy*, Cass. Turin, June 30, 1882 (Cass. Tor. 1882, 2, 215); App. Genoa, March 24, 1888 (Circ. Genov. 1888, p. 188). A few cases have applied the lex fori. *France*, Trib. Civ. Seine, Nov. 28, 1891 (19 Clunet, 712); App. Rennes, May 20, 1899 (15 Autran, 25). See, also, Cass. March 13, 1900 (D. 1903, 1, 89), and note by Levillain.

CHAPTER IV.

JUDGMENTS.

20 pages.

PAINE v. SCHENECTADY INS. CO.

(Supreme Court of Rhode Island, 1876, 1877. 11 R. I. 411.)

DURFEE, C. J. This is an action of assumpsit to recover damages for breach of contract. It was commenced in the court of common pleas, August 27, 1870. The plaintiff recovered judgment in that court at the December term, 1875. The defendant appealed to this court at the March term, 1876. May 13, 1876, the defendant filed a plea puis darrein continuance, setting forth that on the 8th May, 1876, George T. Hanford, who had been duly appointed receiver of the goods and effects of the defendant, had impleaded the plaintiff in the Supreme Court, in the state of New York, and recovered judgment against him for $1,878.11, and costs, "which still remains in full force and effect, not in any wise reversed, annulled, discharged, or satisfied." The plea sets forth the proceeding in the New York suit, showing that the plaintiff therein pleaded in set-off the matters involved in this case, and avers that the cause of action and the issue raised by the pleadings are the same in both suits, and that the parties are identical. To this plea the plaintiff demurs, assigning four causes of demurrer.

The first cause is, that the suit set forth in the plea is not alleged to have been instituted before the commencement of the present suit. And in his brief, the counsel for the plaintiff contends that there is no precedent for such a plea where the judgment was recovered by the defendant, or was recovered in a suit commenced subsequently to the suit in which it was pleaded.

We do not see that it makes any difference which party has recovered judgment. The true question is, whether the controversy has been determined by a competent tribunal having jurisdiction; for, if it has been, the defendant has the right to insist that it shall not be further prosecuted, unless for some technical reason he cannot have the benefit of the estoppel. The plaintiff says he cannot have the benefit of the estoppel because the suit in this state was first commenced. Is this so? We think not. The defendant had the right to sue the plaintiff in New York, notwithstanding the plaintiff had sued him in Rhode Island. The plaintiff, in defending against the New York suit, put in issue the same controversy which was in issue in the Rhode Island suit, and it was decided against him. Why should he not be concluded, and, if concluded, why should not the defendant have the benefit

of the conclusion by plea puis darrein? If the judgment in New York had been recovered before the suit in Rhode Island, the defendant would certainly have been entitled to plead it. Indeed, such a judgment would be pleadable in bar if recovered in a foreign country, and a fortiori, under the federal Constitution and law, when recovered in a sister state. Ricardo v. Garcias, 12 Cl. & Fin. 368; Bissell v. Briggs, 9 Mass. 462, 6 Am. Dec. 88; Mills v. Duryee, 7 Cranch (U. S.) 481, 3 L. Ed. 411; 2 Am. Lead. Cas. (5th Ed.) 611 et seq., where this subject is discussed, and the cases fully cited.

The two cases of Baxley v. Linah, 16 Pa. 241, 55 Am. Dec. 494; and North Bank v. Brown, 50 Me. 214, 79 Am. Dec. 609, are closely in point. In Baxley v. Linah, 16 Pa. 241, 55 Am. Dec. 494, an action was commenced in Maryland December 30, 1846, and in Pennsylvania, for the same cause, June 2, 1847. The defendant pleaded the prior pendency of the Maryland action in abatement to the Pennsylvania action, and the plea was overruled, the plea of prior pendency being available only when both actions are pending in the same state. Bowne v. Joy, 9 Johns. (N. Y.) 221; Walsh v. Durkin, 12 Johns. (N. Y.) 99. Subsequently, January 31, 1848, the plaintiff recovered judgment against the defendant in the Maryland action; and December 5, 1849, the defendant pleaded it in bar puis darrein continuance. The plaintiff demurred. The court, however, sustained the plea.

The only material difference between that case and the case at bar is, that there the judgment was recovered first in the earlier case, here in the later. But the judgment, whenever recovered, is still a judgment; and why, then, is it not pleadable as such? In North Bank v. Brown, 50 Me. 214, 79 Am. Dec. 609, the plaintiff commenced suit against the defendant in Maine, January 11, 1858; and in New York, for the same cause, January 21, 1858. Judgment was first obtained in the New York suit, and it was held to be a good defence to the suit in Maine. Here the judgment does not appear to have been specially pleaded; but if it had been specially pleaded, we see no reason why the decision would not have been the same. We think the first cause of demurrer is not sufficient. * * *[1]

Demurrer overruled.

After the foregoing opinion, the plaintiff replied to the plea puis darrein continuance:

1. That the judgment of the Supreme Court of New York set forth in the plea had been appealed from, and that the suit wherein judgment had been given was consequently pending in the Supreme Court of New York.

2. That the receiver Hanford acted without authority, and did not institute the New York suit in behalf of the defendant corporation but for himself.

[1] The balance of the opinion, discussing the other causes of demurrer, has been omitted.

3. That the cause of action in the New York suit was not that in the present case.

All these replications concluded to the country. The defendant demurred to them all.

DURFEE, C. J. This is an action of assumpsit to which the defendant pleads in bar a former judgment recovered in the Supreme Court of the State of New York. The plaintiff replies that the judgment has been appealed from by him, and the suit is still pending in the court. The defendant demurs to the replication.

The defendant contends that by the law of New York an appeal does not vacate the judgment appealed from, but leaves it, until annulled or reversed, conclusive upon the parties.

Two questions arise upon the demurrers:

1. The first question is, whether we can take judicial cognizance of the law of New York, or must presume it to be the same as ours until it is shown by averment and proof to be different. The decisions upon this point are conflicting, but we think the decision of the Supreme Court of Pennsylvania, in State of Ohio v. Hinchman, 27 Pa. 479, rests upon the better reason. The court there held, that, when the judgment impleaded is the judgment of a sister state, the court will notice ex officio the law of the state in which it was rendered. The reason given for this is, that, in such a case, the court acts under the Constitution and laws of the United States, which require that the judgment shall have in every state the same faith and credit which it has in the state where it was originally rendered. In such a case, it was said, the decision of the state court is re-examinable in the Supreme Court of the United States, which will, without averment or proof, take cognizance of the law of the state in which the record originates. "It would be a very imperfect and discordant administration," it was further said, "for the court of original jurisdiction to adopt one rule of decision, while the court of final resort was governed by another; and hence it follows that in questions of this sort we should take notice of the local laws of a sister state in the same manner the Supreme Court of the United States would do on a writ of error to our judgment." See, also, Baxley v. Linah, 16 Pa. 241, 55 Am. Dec. 494; Rae v. Hulbert, 17 Ill. 572, 578; Butcher v. Bank of Brownsville, 2 Kan. 70, 83 Am. Dec. 446; 2 Am. Lead. Cas. 648 et seq. We think the reasoning is sound, and that it is not satisfactorily met by courts which adopt a different view. Rape v. Heaton, 9 Wis. 328, 341, 76 Am. Dec. 269.

2. The second question relates to the conclusiveness of the judgment. We find, as claimed by the defendant, that by the law of New York an appeal, though it may stay the execution when proper security is given, does not affect the conclusiveness of the judgment as long as it remains unreversed. A judgment so appealed from is a valid bar to an action involving the same controversy. Sage v. Harpending, 49 Barb. (N. Y.) 166; Harris v. Hammond, 18 How. Prac. (N. Y.) 123; Rath-

bone v. Morris, 9 Abb. Prac. (N. Y.) 213; Freeman on Judgments, § 328. If the judgment would be a good bar to this action in New York, it is entitled to have the same effect in this state. Mills v. Duryee, 7 Cranch (U. S.) 481, 3 L. Ed. 411; McElmoyle v. Cohen, 13 Pet. (U. S.) 312, 10 L. Ed. 177; Jacquette v. Hugunon, 2 McLean (U. S.) 129, Fed. Cas. No. 7,169. The case of Bank of North America v. Wheeler, 28 Conn. 433, 73 Am. Dec. 683, is a case exactly in point. After the commencement of that case in Connecticut a judgment was recovered for the same cause of action in New York, and it was held that the judgment, notwithstanding it had been appealed from, was a good bar to the suit in Connecticut; it being found that, by the law of New York, the appeal operated only as a proceeding in error and did not vacate the judgment. We think, therefore, that the demurrer to the first replication must be sustained.

We will add, however, as a matter of practice, that we think the pendency of the appeal in New York may be a good ground for delaying judgment here until the appeal is disposed of; for otherwise we may give the judgment here a permanently conclusive effect, whereas in New York, if the appeal is successful, it will be conclusive only for a short time.

There are two other replications which are demurred to; but we think they raise issues of fact, which the plaintiff is entitled to have tried. The demurrers to them are, therefore, overruled.[2]

LYNDE v. LYNDE.

(Supreme Court of the United States, 1901. 181 U. S. 183, 21 Sup. Ct. 555, 45 L. Ed. 810.)

Error to the Supreme Court of the State of New York.

GRAY, J.[3] * * * By the Constitution and the act of Congress requiring the faith and credit to be given to a judgment of the court of another state that it has in the state where it was rendered, it was long ago declared by this court: "The judgment is made a debt of record, not examinable upon its merits; but it does not carry with it, into another state, the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another state, it must be made a judgment there, and can only

[2] CONTINENTAL LAW.—The defense of lis pendens is recognized in Germany if in the country where the suit was first instituted reciprocity in this respect is guaranteed. R. G. Jan. 26, 1892 (47 Seuffert's Archiv, 465); R. G. April 13, 1901 (30 Clunet, 188). It is not recognized in France. App. Paris, July 25, 1877 (5 Clunet, 163); App. Paris, June 15, 1853 (11 Clunet, 65); App. Alger, Oct. 15, 1902 (31 Clunet, 895). Nor in Italy. App. Milan, April 11, 1894 (Monitore 1894, p. 498); App. Genoa, Sept. 5, 1896 (La Legge 1896, 2, 664); Cass. Turin, July 27, 1904 (1 Darras, 759), and note.

[3] The statement of facts and a part of the opinion have been omitted.

be executed in the latter as its laws may permit." McElmoyle v. Cohen, 13 Pet. 312, 325, 10 L. Ed. 177; Thompson v. Whitman, 18 Wall. 457, 463, 21 L. Ed. 897, 899; Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 292, 8 Sup. Ct. 1370, 32 L. Ed. 239, 244; Bullock v. Bullock, 51 N. J. Eq. 444, 27 Atl. 435; Id., 52 N. J. Eq. 561, 30 Atl. 676, 27 L. R. A. 213, 46 Am. St. Rep. 528.

The decree of the Court of Chancery of New Jersey, on which this suit is brought, provides, first, for the payment of $7,840 for alimony already due, and $1,000 counsel fee; second, for the payment of alimony since the date of the decree at the rate of $80 per week; and, third, for the giving of a bond to secure the payment of these sums, and, on default of payment or of giving bond, for leave to apply for a writ of sequestration, or a receiver and injunction.

The decree for the payment of $8,840 was for a fixed sum already due, and the judgment of the court below was properly restricted to that. The provision of the payment for alimony in the future was subject to the discretion of the Court of Chancery of New Jersey, which might at any time alter it, and was not a final judgment for a fixed sum. The provisions for bond, sequestration, receiver, and injunction being in the nature of execution, and not of judgment, could have no extraterritorial operation; but the action of the courts of New York in these respects depended on the local statutes and practice of the state, and involved no federal question.

On the writ of error of the wife, therefore,

The judgment is affirmed.[4]

PEMBERTON v. HUGHES.

(Court of Appeal, 1899. 68 L. J. Ch. [N. S.] 281, 1 Ch. 781.)

Appeal from a decision of Kekewich, J.

The action was brought by Sarah Elizabeth Pemberton, who claimed to be the widow of Francis Alexander Pemberton, who died on August 2, 1892, for a declaration that by virtue of a deed poll executed by Mr. Pemberton, dated April 15, 1891, she was entitled during her life to a yearly rent charge of £200. for her jointure, issuing out of certain lands in Cambridgeshire, devised by the will of one Christopher Pemberton. The plaintiff's right to this sum depended upon whether she was the widow of Mr. Pemberton, and that depended upon the validity of their alleged marriage, and that depended upon the va-

[4] Compare Sistare v. Sistare, 218 U. S. 1, 30 Sup. Ct. 682, 54 L. Ed. 905, 28 L. R. A. (N. S.) 1068, 20 Ann. Cas. 1061 (1910); see, also, Page v. Page, 189 Mass. 85, 75 N. E. 92 (1905); Israel v. Israel, 148 Fed. 576, 79 C. C. A. 32, 9 L. R. A. (N. S.) 1168 (1906); Freund v. Freund (N. J. Ch.) 63 Atl. 756 (1906).

No action can be brought upon a foreign judgment which at the time of such suit has lost its full force in the state where it was rendered. St. Louis Type Foundry Co. v. Jackson, 128 Mo. 119, 30 S. W. 521 (1895). So *Italy*. Cass. Turin, Sept. 24, 1904 (Monitore 1905, 1, 727).

lidity of a previous divorce of the lady from a former husband of the name of Erwin.

The material facts were as follows:

In February, 1884, the plaintiff and Erwin, who were both domiciled and resident in the state of Florida, were married in that country according to the laws thereof. On January 18, 1888, Erwin—he and the plaintiff being then in Florida—sued the plaintiff for and obtained a decree for divorce. This decree was pronounced by a court having jurisdiction in Florida to pronounce divorces between persons domiciled and resident in Florida, and the decree had never been set aside or reversed, but stood as a final and subsisting decree.

On December 20, 1890, Erwin being still alive, the plaintiff and Mr. Pemberton married in Florida, and they lived together as man and wife until the death of Mr. Pemberton in August, 1892. Under the will and codicil of his grandfather Christopher Pemberton, who died on October 22, 1850, Mr. Pemberton was entitled to certain estates in Cambridgeshire for his life, and he had power to charge them with an annuity or jointure of £200. a year in favor of any woman whom he should marry, or have married. In exercise of this power he, by deed poll of April 15, 1891, appointed the £200. a year to the plaintiff. The defendants, who were entitled to the estates, disputed the validity of the appointment, contending that the decree divorcing the plaintiff from her former husband, Erwin, was void and of no effect by the law of Florida. They based their contention on the ground that the subpœna to appear did not give the wife ten clear days for appearance, the subpœna having been served on the wife on November 25, 1887, and the time fixed for the wife's appearance being December 5, 1887.

On behalf of the plaintiff it was contended that, having regard to the rule requiring ten days' service of notice, the terminal days might be reckoned for the purpose of determining whether there had been effective process.

Kekewich, J., was of opinion that there should have been ten clear days between the day of the issue of the writ and the day on which it was returnable; and on the evidence of the experts he came to the conclusion that this defect in process went to the root of the jurisdiction of the court in Florida, and that the decree of divorce was consequently invalid. He dismissed the plaintiff's action with costs.

The plaintiff appealed.[5]

LINDLEY, M. R.[6] The evidence of the law of Florida is not to my mind so clear as to convince me that the decree standing as it does unimpeached, could be treated in a collateral proceeding as wholly null and void even in Florida. * * * Further information on this point could be procured, if necessary, under the provisions of the

[5] The statement of facts has been abridged.

[6] A part of the opinion of Lindley, M. R., and the concurring opinions of Rigby and Vaughan-Williams, L. JJ., have been omitted.

foreign law ascertainment act of 1861 (24 & 25 Vict. c. 11), but, in my opinion, it is not necessary to pursue this question further.

Assuming that the defendants are right, and that the decree of divorce is void by the law of Florida, it by no means follows that it ought to be so regarded in this country. It sounds paradoxical to say that a decree of a foreign court should be regarded here as more efficacious or with more respect than it is entitled to in the country in which it was pronounced. But this paradox disappears when the principles on which English courts act in regarding or disregarding foreign judgments are borne in mind. If a judgment is pronounced by a foreign court over persons within its jurisdiction, and in a matter with which it is competent to deal, English courts never investigate the propriety of the proceedings in the foreign court unless they offend against English views of substantial justice. Where no substantial justice, according to English notions, is offended, all that English courts look to are the finality of the judgment and the jurisdiction of the court, in this sense and to this extent—namely, its competence to entertain the sort of case which it did deal with, and its competence to require the defendant to appear before it. If the court had jurisdiction in this sense, and to this extent, the courts of this country never inquire whether the jurisdiction has been properly or improperly exercised, provided always that no substantial injustice, according to English notions, has been committed. There is no doubt that the courts of this country will not enforce the decisions of foreign courts, which have no jurisdiction in the sense above explained—that is, over the subject-matter or over the persons brought before them. Schibsby v. Westenholz, 40 L. J. Q. B. 73; L. R. 6 Q. B. 155; Rousillon v. Rousillon (1880) 49 L. J. Ch. 338; 14 Ch. D. 351; Price v. Dewhurst (1838) 8 L. J. Ch. 57; 4 Myl. & Cr. 76; Buchanan v. Rucker, 1 Campb. 63, 180b; 9 East, 192; and Sirdar Gurdyal Singh v. Faridkote (Rajah) [1894] A. C. 670. But the jurisdiction which alone is important in these matters is the competence of the court in an international sense—that is, its territorial competence over the subject-matter and over the defendant. Its competence or jurisdiction in any other sense is not regarded as material by the courts of this country.

This is pointed out in Westlake on Private International Law (3d Ed.) § 328, and in Foote's Private International Jurisprudence (2d Ed.) p. 547, and is illustrated by Vanquelin v. Bouard, 33 L. J. C. P. 78; 15 C. B. (N. S.) 341. That was an action on a judgment obtained in France on a bill of exchange. The court was competent to try such actions and the defendant was within its jurisdiction. He let judgment go by default, and in the action in this country on the judgment he pleaded that by French law the French court had no jurisdiction because the defendant was not a trader and was not resident in a particular town where the cause of action arose. In other words, the defendant pleaded that the French action was brought in the wrong court. The Court of Common Pleas held the plea bad, and that the defence set

up by it should have been raised in the French action. The French action in Vanquelin v. Bouard, 33 L. J. C. P. 78; 15 C. B. (N. S.) 341, was an action in personam, and the parties to the action in France were also the parties to the action brought in this country on the French judgment. The decision, therefore, does not exactly cover the present case, but it goes far to show that the defendants' contention in this case cannot be supported. The defendants' contention entirely ignores the distinction between the jurisdiction of tribunals from an international and their jurisdiction from a purely municipal point of view. But that distinction rests on good sense and is recognized by modern writers on private international law. See Westlake and Foote, ubi supra, and Piggott on Foreign Judgments (2d Ed.) p. 129, and following pages. He says (page 130): "The jurisdiction to pronounce judgment in a suit depends solely on the right to summon a person before the tribunal to defend the suit." Wharton's Conflict of Laws contains (section 792, and following sections) a careful review of the question by a learned American lawyer, and he brings out the distinction very clearly (sections 801 and 812). In section 812 he says, "The true test seems to be competency according to the rules of international law;" and it is plain that these do not include mere rules of procedure. In Dicey's Conflict of Laws there are some valuable chapters (XI, p. 361, and XVI, p. 400), on the jurisdiction of foreign courts, and in them will be found various meanings of the expression "court of competent jurisdiction." These various meanings show the danger of using that expression without taking care to avoid the confusion to which they otherwise give rise.

It may be safely said that, in the opinion of writers on international law and for international purposes, the jurisdiction or the competency of a court does not depend upon the exact observance of its own rules of procedure. The defendants' contention is based upon the assumption that an irregularity in procedure of a foreign court of competent jurisdiction in the sense above explained is a matter which the courts of this country are bound to recognize if such irregularity involves nullity of sentence. No authority can be found for any such proposition; and, although I am not aware of any English decision exactly to the contrary, there are many which are so inconsistent with it as to shew that it cannot be accepted. A judgment of a foreign court having jurisdiction over the parties and subject-matter—that is, having jurisdiction to summon the defendants before it and to decide such matters as it has decided—cannot be impeached in this country on its merits. Castrique v. Imrie, 39 L. J. C. P. 350; L. R. 4 H. L. 414 (in rem); Godard v. Gray, 40 L. J. Q. B. 62; L. R. 6 Q. B. 139 (in personam); and Messina v. Petrococchino [1872] 41 L. J. P. C. 27; L. R. 4 P. C. 144 (in personam). It is quite inconsistent with these cases, and also with Vanquelin v. Bouard, 33 L. J. C. P. 78; 15 C. B. (N. S.) 341, to hold that such a judgment can be impeached here for a mere error in procedure. And in Castrique v. Imrie, 39 L. J. C.

P. 350; L. R. 4 H. L. 414, Lord Colonsay said that no inquiry on such a matter should be made. A decree for divorce, altering as it does the status of the parties, and affecting, as many do, the legitimacy of their after-born children, is much more like a judgment in rem than a judgment in personam. Niboyet v. Niboyet [1878] 48 L. J. P. 1, 5; 4 P. D. 1, 12. And where there are differences between the two, the decisions on foreign judgments in rem are better guides for the determination of this case than decisions on foreign judgments in personam. The leading recent cases on foreign judgments in rem are Doglioni v. Crispin, 35 L. J. P. & M. 129; L. R. 1 H. L. 301, in 1866, Castrique v. Imrie, 39 L. J. C. P. 350; L. R. 4 H. L. 414, in 1870, and Trufort, In re, Trafford v. Blanc, 57 L. J. Ch. 135, 36 Ch. D. 600, in 1887. There is nothing, however, in the decisions in these cases to assist the defendants. On the contrary, the judgments delivered in them are, in my opinion, adverse to the defendants' contention.

In Doglioni v. Crispin, 35 L. J. P. & M. 129; L. R. 1 H. L. 301, a Portuguese court decided that the respondent was the natural son of a deceased man domiciled in Portugal and not a noble, and that the respondent was consequently entitled to succeed to his father's personal estate. The appellant was a party to those proceedings, but she afterwards claimed the property in question under a will of the deceased. She was held precluded from disputing the Portuguese decree. Lord Cranworth distinctly stated that the decision having been pronounced by a court of competent jurisdiction was one which English courts were "bound to receive without inquiry as to its conformity or nonconformity with the laws of the country where it was pronounced"; and a little lower down he stated that, in his opinion, evidence to show that the decision was not in accordance with Portuguese law ought not to have been received. Lord Cranworth's judgment did not, as I understand it, turn on the fact that the appellant was personally estopped from disputing the Portuguese judgment because she was a party to the proceedings in Portugal. His decision was based on the competence of the court and the nature of the controversy before it.

It is necessary, however, to bear in mind that undefended proceedings for divorce require to be very narrowly scrutinized, for such divorces may be easily connived at. It is unnecessary to consider whether an English court would recognize a foreign divorce proved to have been obtained by collusion, even if the parties divorced were foreigners domiciled and resident within the jurisdiction of the foreign court. No collusion is relied upon or proved in the present case. If, therefore, the principles above explained are correct, I see no ground on which an English court can refuse to recognize the validity of the divorce in question in this case, unless it be on one or other of the two following grounds—namely, first, that a foreign divorce decree pronounced in an undefended action will never be recognized in this country; or secondly, that the courts of this country will not recognize

any divorce, even of foreigners, for any causes other than those for which a divorce can be obtained in this country. To lay down now for the first time either of these doctrines is, in my judgment, quite impossible, nor were they alluded to by counsel. I thought it, however, desirable to mention them in order that it might not be supposed that they had been overlooked.

In the result, the appeal must be allowed and the judgment reversed, and a declaration be made that the plaintiff is entitled to the £200. a year, with an account and order for payment. The defendants must pay the costs of the action and of the appeal.[7]

THOMPSON v. WHITMAN.

(Supreme Court of the United States, 1873. 18 Wall. 457, 21 L. Ed. 897.)

Error to the Circuit Court for the Southern District of New York.

BRADLEY, J.[8] The main question in the cause is, whether the record produced by the defendant was conclusive of the jurisdictional facts therein contained. It stated, with due particularity, sufficient

[7] CONTINENTAL LAW.—No foreign judgment will be given effect in Germany unless it was rendered by a court competent according to the rules governing the jurisdiction of German courts. Section 328, subd. 1, Code Civ. Proc.; R. G. March 8, 1907 (Juristische Wochenschrift, 1907, p. 265). The very court rendering the judgment must be competent. Competency of the courts of the state or country in general is not enough. If the foreign court had jurisdiction according to German law, the fact that its jurisdiction in a particular case was based upon a ground not recognized by German law, is immaterial. 51 R. G. 135 (March 21, 1902).

In France, also (semble), the particular court must have had jurisdiction. Cass. April 27, 1870 (S. 1871, 1, 91); but in both France and Italy the question of jurisdiction is to be determined on principle, it would seem, by the rules obtaining in the country where the judgment was rendered. App. Paris, Dec. 20, 1906 (3 Darras, 202); Cass. Naples, Dec. 6, 1866 (Annali 1866, 1, 119). Such principle is frequently departed from in practice, however, and the lex fori substituted, on the ground that the dispositions of the foreign law are exorbitant. App. Lyon, June 18, 1907 (35 Clunet, 158); App. Aix, July 22, 1901 (S. 1903, 2, 305) and note by E. Audinet; Cass. Palermo, April 11, 1893 (S. 1895, 4, 21); App. Naples, Dec. 30, 1883 (12 Clunet, 464). Contra: App. Chambéry, Aug. 13, 1900 (S. 1903, 2, 305). Or by way of retorsion. App. Lyon, June 18, 1907 (35 Clunet, 158).

Such foreign judgment will be enforced if there was an express or implied submission to the foreign jurisdiction. Tr. Com. Seine, June 17, 1907 (35 Clunet, 170); App. Palermo, Aug. 4, 1893 (21 Clunet, 918); Comp. App. Rennes, Dec. 26, 1879 (S. 1881, 2, 81).

The regularity of the citation is likewise governed by the law of the state where the judgment was rendered. App. Paris, Dec. 20, 1906 (3 Darras, 202); Cass. Palermo, April 11, 1893 (S. 1895, 4, 21). But the mode of serving a defendant in Italy in a foreign suit has been held by the Italian courts to be subject to the rule "locus regit actum," and thus to be governed by Italian law. Cass. Turin, March 21, 1892 (Monitore 1892, p. 481); App. Milan, April 4, 1887 (Monitore 1887, p. 397). Contra: App. Milan, Nov. 26, 1888 (Monitore 1888, p. 1015); App. Casale, Feb. 26, 1907 (35 Clunet, 595); Cass. Florence, May 16, 1907 (35 Clunet, 593).

[8] A part of the opinion only is given.

facts to give the justices jurisdiction under the law of New Jersey. Could that statement be questioned collaterally in another action brought in another state? If it could be, the ruling of the court was substantially correct. If not, there was error. It is true that the court charged generally that the record was only prima facie evidence of the facts stated therein; but as the jurisdictional question was the principal question at issue, and as the jury was required to find specially thereon, the charge may be regarded as having reference to the question of jurisdiction. And if upon that question it was correct, no injury was done to the defendant.

Without that provision of the Constitution of the United States (article 4, § 1) which declares that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state," and the act of Congress passed to carry it into effect, it is clear that the record in question would not be conclusive as to the facts necessary to give the justices of Monmouth county jurisdiction, whatever might be its effect in New Jersey. In any other state it would be regarded like any foreign judgment; and as to a foreign judgment it is perfectly well settled that the inquiry is always open, whether the court by which it was rendered had jurisdiction of the person or the thing. "Upon principle," says Chief Justice Marshall, "it would seem that the operation of every judgment must depend on the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject-matter which it has determined. In some cases, that jurisdiction unquestionably depends as well on the state of the thing as on the constitution of the court. If by any means whatever a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property. Upon principle, then, it would seem that, to a certain extent, the capacity of the court to act upon the thing condemned, arising from its being within, or without, their jurisdiction, as well as the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence." Rose v. Himely, 4 Cranch, 269, 2 L. Ed. 608. To the same effect see Story on the Constitution, c. 29; 1 Greenleaf on Evidence, § 540.

The act of Congress above referred to which was passed 26th of May, 1790 (Act May 26, 1790, c. 11, 1 Stat. 122), after providing for the mode of authenticating the acts, records, and judicial proceedings of the states, declares, "and the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken." It has been supposed that this act, in connection with the constitutional provision which it was intended to carry out, had the effect of rendering the judgments of each state equivalent to domestic judgments in every other state, or at least of giving to them in every other state

the same effect, in all respects, which they have in the state where they are rendered. And the language of this court in Mills v. Duryee, 7 Cranch (U. S.) 484, 3 L. Ed. 411, seemed to give countenance to this idea. The court in that case held that the act gave to the judgments of each state the same conclusive effect, as records, in all the states, as they had at home; and that nil debet could not be pleaded to an action brought thereon in another state. This decision has never been departed from in relation to the general effect of such judgments where the questions raised were not questions of jurisdiction. But where the jurisdiction of the court which rendered the judgment has been assailed, quite a different view has prevailed. Justice Story, who pronounced the judgment in Mills v. Duryee, in his Commentary on the Constitution, § 1313, after stating the general doctrine established by that case with regard to the conclusive effect of judgments of one state in every other state, adds: "But this does not prevent an inquiry into the jurisdiction of the court in which the original judgment was given, to pronounce it; or the right of the state itself to exercise authority over the person or the subject-matter. The Constitution did not mean to confer [upon the states] a new power or jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within their territory." In the Commentary on the Conflict of Laws, § 609, substantially the same remarks are repeated, with this addition: "It [the Constitution] did not make the judgments of other states domestic judgments to all intents and purposes, but only gave a general validity, faith, and credit to them, as evidence. No execution can issue upon such judgments without a new suit in the tribunals of other states. And they enjoy not the right of priority or lien which they have in the state where they are pronounced, but that only which the lex fori gives to them by its own laws in their character of foreign judgments." Many cases in the state courts are referred to by Justice Story in support of this view. Chancellor Kent expresses the same doctrine in nearly the same words, in a note to his Commentaries. Volume 1, p. 281. See, also, volume 2, p. 95, note, and cases cited. "The doctrine in Mills v. Duryee," says he, "is to be taken with the qualification that in all instances the jurisdiction of the court rendering the judgment may be inquired into, and the plea of nil debet will allow the defendant to show that the court had no jurisdiction over his person. It is only when the jurisdiction of the court in another state is not impeached, either as to the subject-matter or the person, that the record of the judgment is entitled to full faith and credit. The court must have had jurisdiction not only of the cause, but of the parties, and in that case the judgment is final and conclusive." The learned commentator adds, however, this qualifying remark: "A special plea in bar of a suit on a judgment in another state, to be valid, must deny, by positive averments, every fact which would go to show that the

court in another state had jurisdiction of the person, or of the subject-matter." * * *

But it must be admitted that no decision has ever been made on the precise point involved in the case before us, in which evidence was admitted to contradict the record as to jurisdictional facts asserted therein, and especially as to facts stated to have been passed upon by the court.

But if it is once conceded that the validity of a judgment may be attacked collaterally by evidence showing that the court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done no statements contained therein have any force. If any such statements could be used to prevent inquiry, a slight form of words might always be adopted so as effectually to nullify the right of such inquiry. Recitals of this kind must be regarded like asseverations of good faith in a deed, which avail nothing if the instrument is shown to be fraudulent. The records of the domestic tribunals of England and some of the states, it is true, are held to import absolute verity as well in relation to jurisdictional as to other facts, in all collateral proceedings. Public policy and the dignity of the courts are supposed to require that no averment shall be admitted to contradict the record. But, as we have seen, that rule has no extraterritorial force.

It may be observed that no courts have more decidedly affirmed the doctrine that want of jurisdiction may be shown by proof to invalidate the judgments of the courts of other states, than have the courts of New Jersey. The subject was examined and the doctrine affirmed, after a careful review of the cases, in the case of Moulin v. Trenton Mut. Life & Fire Ins. Co., in 24 N. J. Law, 222, and again in the same case in 25 N. J. Law, 57, and in Ward v. Price, 25 N. J. Law, 225, and as lately as November, 1870, in the case of Gordon v. Mackay, 34 N. J. Law, 286. The judgment of Chief Justice Beasley in the last case is an able exposition of the law. It was a case similar to that of D'Arcy v. Ketchum, in 11 How. 165, 13 L. Ed. 648, being a judgment rendered in New York under the statutes of that state, before referred to, against two persons, one of whom was not served with process. "Every independent government," says the Chief Justice, "is at liberty to prescribe its own methods of judicial process, and to declare by what forms parties shall be brought before its tribunals. But, in the exercise of this power, no government, if it desires extraterritorial recognition of its acts, can violate those rights which are universally esteemed fundamental and essential to society. Thus a judgment by the court of a state against a citizen of such state, in his absence, and without any notice, express or implied, would, it is presumed, be regarded in every external jurisdiction as absolutely void and unenforce-

able. Such would certainly be the case if such judgment was so rendered against the citizen of a foreign state."

On the whole, we think it clear that the jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state, notwithstanding the provision of the fourth article of the Constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself. * * *[9]

PENNOYER v. NEFF.

(Supreme Court of the United States, 1877. 95 U. S. 714, 24 L. Ed. 565.)

Error to the Circuit Court of the United States for the District of Oregon.

FIELD, J.[10] This is an action to recover the possession of a tract of land, of the alleged value of $15,000, situated in the state of Oregon. The plaintiff asserts title to the premises by a patent of the United States issued to him in 1866, under Act Cong. Sept. 27, 1850, c. 76, 9 Stat. 496, usually known as the "Donation Law of Oregon." The defendant claims to have acquired the premises under a sheriff's deed, made upon a sale of the property on execution issued upon a judgment recovered against the plaintiff in one of the circuit courts of the state. The case turns upon the validity of this judgment.

It appears from the record that the judgment was rendered in February, 1866, in favor of J. H. Mitchell, for less than $300, including costs, in an action brought by him upon a demand for services as an attorney; that, at the time the action was commenced and the judgment rendered, the defendant therein, the plaintiff here, was a nonresident of the state, that he was not personally served with process, and did not appear therein; and that the judgment was entered upon his default in not answering the complaint, upon a constructive service of summons by publication.

The Code of Oregon provides for such service when an action is brought against a nonresident and absent defendant, who has property within the state. It also provides, where the action is for the recovery of money or damages, for the attachment of the property of the nonresident. And it also declares that no natural person is subject to the jurisdiction of a court of the state, "unless he appear in the court,

[9] To the effect that the record may be contradicted as to the facts necessary to give the court jurisdiction, see Cooper v. Newell, 173 U. S. 555, 19 Sup. Ct. 506, 43 L. Ed. 808 (1899); Andrews v. Andrews, 188 U. S. 14, 23 Sup. Ct. 237, 47 L. Ed. 366 (1903); Old Wayne Mut. Life Ass'n v. McDonough, 204 U. S. 8, 27 Sup. Ct. 236, 51 L. Ed. 345 (1907). But see Caughran v. Gilman, 72 Iowa, 570, 34 N. W. 423 (1887); Magowan v. Magowan, 57 N. J. Eq. 322, 42 Atl. 330 (1899).

[10] The statement of facts, parts of the opinion, and the dissenting opinion of Hunt, J., have been omitted.

or be found within the state, or be a resident thereof, or have property therein; and, in the last case, only to the extent of such property at the time the jurisdiction attached." Construing this latter provision to mean, that, in an action for money or damages where a defendant does not appear in the court, and is not found within the state, and is not a resident thereof, but has property therein, the jurisdiction of the court extends only over such property, the declaration expresses a principle of general, if not universal, law. The authority of every tribunal is necessarily restricted by the territorial limits of the state in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse. D'Arcy v. Ketchum, 11 How. 165, 13 L. Ed. 648. In the case against the plaintiff, the property here in controversy sold under the judgment rendered was not attached, nor in any way brought under the jurisdiction of the court. Its first connection with the case was caused by a levy of the execution. It was not, therefore, disposed of pursuant to any adjudication, but only in enforcement of a personal judgment, having no relation to the property, rendered against a nonresident without service of process upon him in the action, or his appearance therein. The court below did not consider that an attachment of the property was essential to its jurisdiction or to the validity of the sale, but held that the judgment was invalid from defects in the affidavit upon which the order of publication was obtained, and in the affidavit by which the publication was proved.

There is some difference of opinion among the members of this court as to the rulings upon these alleged defects. The majority are of opinion that inasmuch as the statute requires, for an order of publication, that certain facts shall appear by affidavit to the satisfaction of the court or judge, defects in such affidavit can only be taken advantage of on appeal, or by some other direct proceeding, and cannot be urged to impeach the judgment collaterally. * * *

If, therefore, we were confined to the rulings of the court below upon the defects in the affidavits mentioned, we should be unable to uphold its decision. But it was also contended in that court, and is insisted upon here, that the judgment in the state court against the plaintiff was void for want of personal service of process on him, or of his appearance in the action in which it was rendered, and that the premises in controversy could not be subjected to the payment of the demand of a resident creditor except by a proceeding in rem; that is, by a direct proceeding against the property for that purpose. If these positions are sound, the ruling of the Circuit Court as to the invalidity of that judgment must be sustained, notwithstanding our dissent from the reasons upon which it was made. And that they are sound would seem to follow from two well-established principles of public law respecting the jurisdiction of an independent state over persons and property. The several states of the Union are not, it is true, in every

respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent states, and the principles of public law to which we have referred are applicable to them. One of these principles is, that every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every state has the power to determine for itself the civil status and capacities of its inhabitants; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced; and also to regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed, and transferred. The other principle of public law referred to follows from the one mentioned; that is, that no state can exercise direct jurisdiction and authority over persons or property without its territory. Story, Confl. Laws, c. 2; Wheat. Int. Law, pt. 2, c. 2. The several states are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one state have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. "Any exertion of authority of this sort beyond this limit," says Story, "is a mere nullity, and incapable of binding such persons or property in any other tribunals." Story, Confl. Laws, § 539.

But as contracts made in one state may be enforceable only in another state, and property may be held by nonresidents, the exercise of the jurisdiction which every state is admitted to possess over persons and property within its own territory will often affect persons and property without it. To any influence exerted in this way by a state affecting persons resident or property situated elsewhere, no objection can be justly taken; whilst any direct exertion of authority upon them, in an attempt to give ex-territorial operation to its laws, or to enforce an ex-territorial jurisdiction by its tribunals, would be deemed an encroachment upon the independence of the state in which the persons are domiciled or the property is situated, and be resisted as usurpation.

Thus the state, through its tribunals, may compel persons domiciled within its limits to execute, in pursuance of their contracts respecting property elsewhere situated, instruments in such form and with such solemnities as to transfer the title, so far as such formalities can be complied with; and the exercise of this jurisdiction in no manner interferes with the supreme control over the property by the state within which it is situated. Penn v. Lord Baltimore, 1 Ves. 444;

Massie v. Watts, 6 Cranch, 148, 3 L. Ed. 181; Watkins v. Holman, 16 Pet. 25, 10 L. Ed. 873; Corbett v. Nutt, 10 Wall. 464, 19 L. Ed. 976.

So the state, through its tribunals, may subject property situated within its limits owned by nonresidents to the payment of the demand of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the state where the owners are domiciled. Every state owes protection to its own citizens; and, when nonresidents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such nonresidents to satisfy the claims of its citizens. It is in virtue of the state's jurisdiction over the property of the nonresident situated within its limits that its tribunals can inquire into that nonresident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the nonresident have no property in the state, there is nothing upon which the tribunals can adjudicate. * * *

If, without personal service, judgments in personam, obtained ex parte against nonresidents and absent parties, upon mere publication of process, which, in the great majority of cases, would never be seen by the parties interested, could be upheld and enforced, they would be the constant instruments of fraud and oppression. Judgments for all sorts of claims upon contracts and for torts, real or pretended, would be thus obtained, under which property would be seized, when the evidence of the transactions upon which they were founded, if they ever had any existence, had perished.

Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings in rem. But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely in personam, constructive service in this form upon a nonresident is ineffectual for any purpose. Process from the tribunals of one state cannot run into another state, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the state where the tribunal sits cannot create any greater obligation

upon the nonresident to appear. Process sent to him out of the state, and process published within it, are equally unavailing in proceedings to establish his personal liability.

The want of authority of the tribunals of a state to adjudicate upon the obligations of nonresidents, where they have no property within its limits, is not denied by the court below: but the position is assumed, that, where they have property within the state, it is immaterial whether the property is in the first instance brought under the control of the court by attachment or some other equivalent act, and afterwards applied by its judgment to the satisfaction of demands against its owner; or such demands be first established in a personal action, and the property of the nonresident be afterwards seized and sold on execution. But the answer to this position has already been given in the statement, that the jurisdiction of the court to inquire into and determine his obligations at all is only incidental to its jurisdiction over the property. Its jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment. If the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendant, or by his subsequent acquisition of it. The judgment, if void when rendered, will always remain void: it cannot occupy the doubtful position of being valid if property be found, and void if there be none. Even if the position assumed were confined to cases where the nonresident defendant possessed property in the state at the commencement of the action, it would still make the validity of the proceedings and judgment depend upon the question whether, before the levy of the execution, the defendant had or had not disposed of the property. If before the levy the property should be sold, then, according to this position, the judgment would not be binding. This doctrine would introduce a new element of uncertainty in judicial proceedings. The contrary is the law: the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently. * * *

Except in cases affecting the personal status of the plaintiff, and cases in which that mode of service may be considered to have been assented to in advance, as hereinafter mentioned, the substituted service of process by publication, allowed by the law of Oregon and by similar laws in other states, where actions are brought against nonresidents, is effectual only where, in connection with process against the person for commencing the action, property in the state is brought under the control of the court, and subjected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein; in other words, where the action is in the nature of a proceeding in rem. As stated by Cooley in his Treatise on Constitutional Limitations, 405, for any other purpose than to subject the property of a nonresident to valid claims against him in the state, "due process of law would require appearance

or personal service before the defendant could be personally bound by any judgment rendered."

It is true that, in a strict sense, a proceeding in rem is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the state, they are substantially proceedings in rem in the broader sense which we have mentioned.

It is hardly necessary to observe, that in all we have said we have had reference to proceedings in courts of first instance, and to their jurisdiction, and not to proceedings in an appellate tribunal to review the action of such courts. The latter may be taken upon such notice, personal or constructive, as the state creating the tribunal may provide. They are considered as rather a continuation of the original litigation than the commencement of a new action. Nations v. Johnson, 24 How. 195, 16 L. Ed. 628.

It follows from the views expressed that the personal judgment recovered in the state court of Oregon against the plaintiff herein, then a nonresident of the state, was without any validity, and did not authorize a sale of the property in controversy.

To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by any thing we have said, that a state may not authorize proceedings to determine the status of one of its citizens towards a nonresident, which would be binding within the state, though made without service of process or personal notice to the nonresident. The jurisdiction which every state possesses to determine the civil status and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory. The state, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved. One of the parties guilty of acts for which, by the law of the state, a dissolution may be granted, may have removed to a state where no dissolution is permitted. The complaining party would, therefore, fail if a divorce were sought in the state of the defendant; and if application could not be made to the tribunals of the complainant's domicile in such case, and proceedings be there instituted without personal service of process or personal notice to the offending party, the injured citizen would be without redress. Bish. Marr. & Div. § 156.

Neither do we mean to assert that a state may not require a nonresident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or repre-

sentative in the state to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure, to make such appointment or to designate such place that service may be made upon a public officer designated for that purpose, or in some other prescribed way, and that judgments rendered upon such service may not be binding upon the nonresidents both within and without the state. As was said by the Court of Exchequer in Vallee v. Dumergue, 4 Exch. 290: "It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have actual notice of them." See, also, Lafayette Ins. Co. v. French, 18 How. 404, 15 L. Ed. 451, and Gillespie v. Commercial Mut. Marine Ins. Co., 12 Gray (Mass.) 201, 71 Am. Dec. 743. Nor do we doubt that a state, on creating corporations or other institutions for pecuniary or charitable purposes, may provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked, which shall require other than personal service upon their officers or members. Parties becoming members of such corporations or institutions would hold their interest subject to the conditions prescribed by law. Copin v. Adamson, Law Rep. 9 Ex. 345.

In the present case, there is no feature of this kind, and, consequently, no consideration of what would be the effect of such legislation in enforcing the contract of a nonresident can arise. The question here respects only the validity of a money judgment rendered in one state, in an action upon a simple contract against the resident of another, without service of process upon him, or his appearance therein.

Judgment affirmed.[11]

CARPENTER v. STRANGE.

(Supreme Court of the United States, 1891. 141 U. S. 87, 11 Sup. Ct. 960, 35 L. Ed. 640.)

FULLER, C. J.[12] * * * The judgment or decree of the New York court was entitled to the same credit and effect in the state of Tennessee that it had in the state of New York where it was rendered. Did it receive it? * * *

[11] The effect of proceedings in rem upon property within the jurisdiction of the court will be recognized in other countries to which such property is subsequently removed. Castrique v. Imrie, L. R. 4 H. L. 414 (1870). See, also, Rose v. Himely, 4 Cranch (U. S.) 241, 2 L. Ed. 608 (1808). But if such foreign proceeding was merely one in personam it will not be enforced elsewhere by proceedings in rem. The City of Mecca, 6 Prob. Div. (C. A.) 106 (1881).

[12] A part of the opinion only is given.

The real estate was situated in Tennessee, and governed by the law of its situs; and while, by means of its power over the person of a party, a court of equity may, in a proper case, compel him to act in relation to property not within its jurisdiction, its decree does not operate directly upon the property, nor affect the title, but is made effectual through the coercion of the defendant; as, for instance, by directing a deed to be executed or canceled by or on behalf of the party. The court "has no inherent power, by the mere force of its decree, to annul a deed, or to establish a title." Hart v. Sansom, 110 U. S. 151, 155, 3 Sup. Ct. 586, 28 L. Ed. 101. Hence, although in cases of trust, of contract, and of fraud the jurisdiction of a court of chancery may be sustained over the person, notwithstanding lands not within the jurisdiction may be affected by the decree (Massie v. Watts, 6 Cranch, 148, 3 L. Ed. 181), yet it does not follow that such a decree is in itself necessarily binding upon the courts of the state where the land is situated. To declare the deed to Mrs. Strange null and void, in virtue alone of the decree in New York, would be to attribute to that decree the force and effect of a judgment in rem by a court having no jurisdiction over the res. By its terms, no provision whatever was made for its enforcement as against Mrs. Strange in respect of the real estate. No conveyance was directed, nor was there any attempt in any way to exert control over her, in view of the conclusion that the court announced. Direct action upon the real estate was certainly not within the power of the court; and as it did not order Mrs. Strange to take any action with reference to it, and she took none, the courts of Tennessee were not obliged to surrender jurisdiction to the courts of New York over real estate in Tennessee, exclusively subject to its laws and the jurisdiction of its courts. Story, Confl. Laws, § 543; Whart. Confl. Laws, §§ 288, 289; Watkins v. Holman, 16 Pet. 25, 10 L. Ed. 873; Northern Indiana R. Co. v. Michigan Cent. R. Co., 15 How. 233, 14 L. Ed. 674; Davis v. Headley, 22 N. J. Eq. 115; Miller v. Birdsong, 7 Baxt. (Tenn.) 531; Cooley v. Scarlett, 38 Ill. 316, 87 Am. Dec. 298; Gardner v. Ogden, 22 N. Y. 327, 78 Am. Dec. 192.

BURNLEY v. STEVENSON.

(Supreme Court of Ohio, 1873. 24 Ohio St. 474, 15 Am. Rep. 621.)

McILVAINE, J.[13] The main proposition submitted in this case is, whether under and by virtue of the decree of the circuit court of Kentucky and the master's deed made in pursuance thereof, or of either of them, such an estate or right was vested in John Evans as entitles the defendant, who has succeeded to all the rights of Evans, to the

[13] The statement of facts has been omitted.

possession of the lands in controversy, as against the plaintiffs, whose claim of title is derived from the parties against whom the decree was rendered.

1. The jurisdiction of the circuit court to pronounce the decree, is the first inquiry involved in this proposition.

It appears from the record before us, that the circuit court of Kentucky, which pronounced the decree, was a court of general equity jurisdiction; that some of the defendants in the cause were properly served with the process of the court, and that all others voluntarily appeared and submitted themselves to its jurisdiction, and that the subject-matter of the bill on which the decree was rendered, was the enforcement of a trust and the specific performance of a contract to convey lands situate in the State of Ohio.

That courts exercising chancery powers in one state have jurisdiction to enforce a trust, and to compel the specific performance of a contract in relation to lands situate in another state, after having obtained jurisdiction of the persons of those upon whom the obligation rests, is a doctrine fully settled by numerous decisions. Penn v. Lord Baltimore, 1 Ves. 444; Massie v. Watts, 6 Cranch (U. S.) 148, 3 L. Ed. 181; Penn v. Hayward, 14 Ohio St. 302, and cases therein cited.

2. It does not follow, however, that a court having power to compel the parties before it to convey lands situated in another state, may make its own decree to operate as such conveyance. Indeed, it is well settled that the decree of such court can not operate to transfer title to lands situate in a foreign jurisdiction. And this, for the reason that a judgment or decree in rem can not operate beyond the limits of the jurisdiction or state wherein it is rendered. And if a decree in such case can not effect the transfer of the title to such lands, it is clear that a deed executed by a master, under the direction of the court, can have no greater effect. Watts v. Waddle, 6 Pet. (U. S.) 389, 8 L. Ed. 437; Page v. McKee, 3 Bush (Ky.) 135, 96 Am. Dec. 201. The master's deed to Evans must therefore be regarded as a nullity.

The next inquiry then is as to the force and effect of the decree rendered by the Circuit Court directing the heirs of Gen. Scott to convey the land in Ohio to Evans. This decree was in personam, and bound the consciences of those against whom it was rendered. In it, the contract of their ancestor to make the conveyance was merged. The fact that the title which had descended to them was held by them in trust for Evans, was thus established by the decree of a court of competent jurisdiction. Such decree is record evidence of that fact, and also of the fact that it became and was their duty to convey the legal title to him. The performance of that duty might have been enforced against them in that court by attachment as for contempt; and the fact that the conveyance was not made in pursuance of the order, does not affect the validity of the decree in so far as it determined the equitable rights of the parties in the land in controversy. In our judgment,

the parties, and those holding under them with notice, are still bound thereby.

3. Under our code of practice, equitable as well as legal defenses may be set up in an action for the recovery of land. The defendant in the court below set up this decree of the circuit court of Kentucky as a defense to the plaintiffs' action. That it did not constitute a good defense at law may be admitted, but we think, in equity, it was a sufficient defense.

The Constitution of the United States declares that full faith and credit shall be given in each state to the records and judicial proceedings of every other state, and provides that Congress may prescribe the mode of proving such records and proceedings, and the effect thereof. By Act May 26, 1790, c. 11, 1 Stat. 122, Congress declared that the "records and judicial proceedings of the state courts," when properly authenticated, "shall have the same faith and credit given to them in every court within the United States, as they have, by law or usage, in the courts of the state from whence they are or shall be taken." When, therefore, a decree rendered by a court in a sister state, having jurisdiction of the parties and of the subject-matter, is offered as evidence, or pleaded as the foundation of a right, in any action in the courts of this state, it is entitled to the same force and effect which it had in the state where it was pronounced. Mills v. Duryee, 7 Cranch (U. S.) 481, 3 L. Ed. 411; Hampton v. McConnel, 3 Wheat. (U. S.) 234, 4 L. Ed. 378; McGilvray & Co. v. Avery, 30 Vt. 538. That this decree had the effect in Kentucky of determining the equities of the parties to the land in this state, we have already shown; hence the courts of this state must accord to it the same effect. True, the courts of this state can not enforce the performance of that decree, by compelling the conveyance through its process of attachment; but when pleaded in our courts as a cause of action, or as a ground of defense, it must be regarded as conclusive of all the rights and equities which were adjudicated and settled therein, unless it be impeached for fraud. See cases supra; also, Davis v. Headley, 22 N. J. Eq. 115; Brown v. Lexington & D. R. Co., 13 N. J. Eq. 191; Dobson v. Pearce, 12 N. Y. 156, 62 Am. Dec. 152; Bank of United States v. Merchants' Bank of Baltimore, 7 Gill (Md.) 415.

Motion overruled.

FALL v. FALL.*

(Supreme Court of Nebraska, 1907. 75 Neb. 120, 113 N. W. 175.)

In 1876, E. W. Fall and Sarah S. Fall were married in Indiana. They afterwards removed to Hamilton county, Neb., and lived in Nebraska until 1889, when they removed to the state of Washington.

*Affirmed in 215 U. S. 1, 30 Sup. Ct. 3, 54 L. Ed. 65, 23 L. R. A. (N. S.) 924, 17 Ann. Cas. 853 (1909).

In 1879, while they lived in Nebraska, E. W. Fall purchased 160 acres of land in Hamilton county, the title to the undivided one-half of which is in controversy. In 1887 he conveyed the farm to Mrs. Fall's brother as an intermediary, who in turn reconveyed to E. W. Fall and Sarah S. Fall, thereby vesting each with an undivided one-half interest in the land. On October 5, 1895, Sarah obtained a divorce from her husband in Washington. The court in the decree of divorce set apart and gave all Nebraska land to the wife as her sole and separate property, and directed the husband to convey the land to the wife in five days. This he refused and neglected to do. The law of Washington requires parties desiring a divorce to bring into court a list and description of all their property, and empowers the judge of the court, sitting as chancellor, to make an equitable division of all the property between the parties.

On May 24, 1895, E. W. Fall executed an indemnity mortgage to his brother, the defendant W. H. Fall, a resident of Nebraska, as defendants allege, to secure him from loss by reason of his having signed a note of $1,000, as surety for E. W. Fall, in September, 1893, for money borrowed from his sister, Elizabeth Eastin. This mortgage was recorded on January 10, 1896. On July 3, 1896, without notice to E. W. Fall, the Washington court appointed one W. T. Scott as commissioner for the purpose, who executed a deed of E. W. Fall's undivided half interest in the Hamilton county land to Sarah S. Fall. This instrument was approved by the judge of the superior court, filed in the office of its clerk, and afterwards recorded in Hamilton county, Neb. On April 27, 1896, E. W. Fall, who in the meantime had become a resident of California, executed a warranty deed to Mrs. Eastin for his undivided one-half interest in the land in payment of the same debt. At the time of the divorce and conveyances the land was incumbered, and Fall's interest in it was apparently worth no more than the amount of the debt.

In 1897 Sarah S. Fall began an action in the District Court of Hamilton County, Neb., to quiet her title to the undivided one-half interest in the land acquired by virtue of the decree of the Washington court and the commissioner's deed and to cancel the aforesaid mortgage and deed executed by E. W. Fall to the defendants W. H. Fall and Elizabeth Eastin, alleging that the mortgage and deed were each made without consideration and for the purpose of defrauding her, and that the mortgage and deed cast a cloud upon her title to such land. Personal service was had upon W. H. Fall. Mrs. Eastin appeared and defended the action. E. W. Fall was served only by publication and did not appear. A judgment in favor of plaintiff, Sarah S. Fall, was affirmed upon appeal (75 Neb. 104, 106 N. W. 412).

On rehearing.[14]

[14] The facts have been abstracted from the opinion of the court.

LETTON, J.[15] * * * The contentions of the appellant in substance are that the decree of the Washington court and the deed executed by the commissioner of said court to Mrs. Sarah S. Fall are absolute nullities in so far as they relate to the land in Nebraska; that Mrs. Fall has no such title or interest in the undivided half interest in the land which had belonged to E. W. Fall that she can maintain this action; that, conceding that the Washington court had the power to compel the execution of the conveyance by E. W. Fall while he was within its jurisdiction, still, since its decree acted only upon the person and not upon the land, and since no action was taken or compelled towards conveying the title to Mrs. Fall, she never acquired any interest in or title to the real estate in this state, and the decree of the Washington court utterly failed to affect the land, or to bind or fetter any action taken by E. W. Fall after he passed beyond the jurisdiction of that court. She further contends that by the laws of this state the courts of Nebraska are not permitted, by a decree in a divorce proceeding, to take the title of real estate from the husband and vest it in the wife, by way of adjusting the equities of the parties in the property of the husband, and that such a proceeding would be in violation of the law and public policy of this state. Upon the other hand, the appellee, Mrs. Fall, contends that the decree of the Washington court in the proceedings for divorce and for a division of the property fixed the equities and bound the conscience of the parties, and created a personal legal contract of record on the part of E. W. Fall to make a conveyance of his interest in the land, which he could not escape by going beyond the jurisdiction of the Washington court, and that the decree is entitled to the same faith and credit in the courts of this state that it has in the courts of Washington; that Mrs. Fall's rights in and to the land, acquired by virtue of the decree, are sufficient to enable her to maintain an action in this state for the purpose of quieting her title to the land; that the decree of the Washington court bound E. W. Fall to such an extent that neither he nor his privies could afterwards set up any right or title in the Nebraska lands against her; and that Mrs. Eastin acquired no right, title, or interest in the land by virtue of the deed from E. W. Fall or the mortgage to W. H. Fall, and that the same were fraudulently made.

Rel. - as to money judgments.
O.K.

If the Washington court had taken the value of the Nebraska land into consideration in fixing the rights of the parties and rendered a money judgment accordingly, such a judgment might be enforced here, under the full faith and credit clause of the United States Constitution, since the court had full power and jurisdiction to render the same. Barber v. Barber, 21 How. (U. S.) 582, 16 L. Ed. 226; Trowbridge v. Spinning, 23 Wash. 48, 62 Pac. 125, 54 L. R. A. 204, 83 Am. St. Rep. 806. And this has been the usual method in such

[15] A part of the opinion and the dissenting opinion of Sedgwick, C. J., have been omitted.

cases. 2 Bishop, Marriage, Divorce & Separation, 1123. But what power had the Washington court to affect the title to the land or to confer equities therein by its decree? The purpose of the statutes of Washington referred to evidently was to give to the courts of that state powers with reference to the ascertainment of the duties of the parties with reference to property, growing out of the marriage relation, of the same nature as those which are enjoyed by courts generally having jurisdiction over divorce, alimony, and the custody and support of children, but greater in extent than those enjoyed by the courts of some states. This power was unknown to the unwritten law, and when no statute exists the courts do not possess it. 2 Bishop, Marriage, Divorce & Separation, § 1119. The power thus given is to be exercised in connection with the proceedings concerning the marriage status. Id. § 826. It is remedial, and ancillary to the divorce proceedings, and not independent. In that state the same marital duties which are enforced here by way of alimony may be enforced by the compulsory division of real estate belonging to either spouse. This division of property is not based upon the view that the innocent party has an equitable interest in the property itself, but upon the fact that it is the duty of a husband to provide for, support, and maintain his wife in such manner as suits and accords with his pecuniary circumstances and station in life, so that she, being innocent, shall not suffer from his fault. It is of the same nature as that exercised by the courts of Nebraska in awarding permanent alimony. In such case it is the duty of the court to consider the condition, situation, and standing of the parties, financial and otherwise, the duration of the marriage, the amount and value of the husband's estate, the source from which it came, and the necessity for the support and education of children. It is a method of enforcing the duty of support and maintenance. Fischli v. Fischli, 1 Blackf. (Ind.) 360, 12 Am. Dec. 251; Shafer v. Shafer, 10 Neb. 468, 6 N. W. 768; Cochran v. Cochran, 42 Neb. 612, 60 N. W. 942; Zimmerman v. Zimmerman, 59 Neb. 80, 80 N. W. 643; Smith v. Smith, 60 Neb. 273, 83 N. W. 72.

It is well established that a court of chancery in a proper case has power to compel a conveyance of lands situated in another country or state, where the persons of the parties interested are within the jurisdiction of the court. It is said by Justice Story: "The ground of this jurisdiction is that courts of equity, have authority to act upon the person. 'Æquitas agit in personam.' And, although they cannot bind the land itself by their decree, yet they can bind the conscience of the party in regard to the land, and compel him to perform his agreement according to conscience and good faith." 2 Story, Eq. § 743; 3 Pomeroy's Eq. Jur. § 1318. The leading case upon this doctrine in England is Penn v. Lord Baltimore, 1 Ves. 444, in which the Chancellor of England decreed a specific performance of a contract respecting lands lying in North America. This case was followed in Massie v. Watts, 6 Cranch (U. S.) 148, 3 L. Ed. 181, in a learned

opinion by Chief Justice Marshall, which examined and reviewed the cases prior to Penn v. Lord Baltimore and announced the rule as follows: "Upon the authority of these cases and of others which are to be found in the books, as well as upon general principles, this court is of opinion that in a case of fraud, or trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree." This case settled the law upon this point, and its principal doctrine has ever since been recognized and enforced by the courts of chancery in this country. "But," says Judge Story, "still it must be borne in mind that the doctrine is not without limitations and qualifications, and that to justify the exercise of the jurisdiction in cases touching lands in a foreign country, the relief sought must be of such a nature as the court is capable of administering in the given case. We have already seen that a bill for a partition of lands in a foreign country will not be entertained in a court of equity, upon the ground that the relief sought cannot be given by issuing a commission to such foreign country. Perhaps a more general reason might be given, founded upon the principles of international law, and that is that real estate cannot be transferred, or partitioned, or charged, except according to the laws of the country in which it is situated." 2 Story's Equity, § 1298.

2. Lex loci
- of a divorce
But Burnley
v. Stevenson
repudiated

It is conceded by the appellee that the decree of the Washington court has no force and effect on the title to property here; but it is contended, mainly upon the authority of Burnley v. Stevenson, 24 Ohio St. 474, 15 Am. Rep. 621, that though the decree of the court of Washington could not affect the title to land in this state, yet, when this decree is pleaded in the Nebraska court as a cause of action, it must be regarded as conclusive of all the rights and equities which were adjudicated and settled in the divorce case. A number of cases have been cited in which it is said this principle is upheld; but we have yet been unable to find a single case in which the direct question at issue was whether or not a decree affecting the title to real estate lying in another state will be recognized in the state in which the land lies, where no conveyance has been made in obedience to the decree, and where the title has been conveyed to third parties. It is true that in Cheever v. Wilson, 9 Wall. (U. S.) 108, 19 L. Ed. 604, and in Dull v. Blackman, 169 U. S. 243, 18 Sup. Ct. 333, 42 L. Ed. 733, there are certain obiter expressions which are quoted in support of such doctrine; but in these cases this question was not before the court for decision; in Cheever v. Wilson an instrument having been executed in performance of the decree, and in Dull v. Blackman the case was decided upon another point. We think there can be no doubt that, where a court of chancery has by its decree ordered and directed persons properly within its jurisdiction to do or refrain from doing a certain act, it may compel obedience to this decree by appropriate proceedings, and that any action taken by reason of such compulsion

is valid and effectual wherever it may be assailed. In the instant case, if Fall had obeyed the order of the Washington court, and made a deed of conveyance to his wife of the Nebraska land, even under the threat of contempt proceedings, or after duress by imprisonment, the title thereby conveyed to Mrs. Fall would have been of equal weight and dignity with that which he himself possessed at the time of the execution of the deed. Gilliland v. Inabnit, 92 Iowa, 46, 60 N. W. 211, was a case of this kind, where the controversy was between the plaintiff, who was the grantee in a conveyance of land in Iowa which had been compelled by a Kentucky court, and the heirs of her grantor. The Iowa court held that the decree of the Kentucky court established the trust and that the conveyance made in consequence of such decree was valid and effectual to convey the Iowa land, even though made by compulsion and by imprisonment of the grantor. * * *

The case of Bullock v. Bullock [52 N. J. Eq. 561, 30 Atl. 676, 27 L. R. A. 213, 46 Am. St. Rep. 528] deserves special examination. In this case the complainant's husband had been adjudged by the Supreme Court of the state of New York, in a divorce proceeding of which it had jurisdiction, to execute a mortgage upon lands in New Jersey to secure the payment of a certain sum per month to the complainant as alimony. He refused to do so, and made other mortgages and conveyances of the lands, which the wife alleged were fraudulently made for the purpose of defeating her rights. She charged that she had acquired an equitable lien in the lands by virtue of the New York decree, and prayed the court to set aside the several mortgages and conveyances, and that he be decreed to execute and deliver the mortgage required by the New York court. It will be seen, therefore, that the case was similar to the one at bar; but it was stronger in this respect: That personal service was had upon the respondent in New Jersey in the action to enforce the decree, while in this case no personal service has been had upon E. W. Fall. The majority of the court held that, while the New York court might have enforced the execution of the mortgage by the defendant while he was within its jurisdiction, this not having been done, the New York decree could not operate as a cause of action affecting the title to land in New Jersey, and it is pointed out "that the doctrine that jurisdiction respecting lands in a foreign state is not in rem, but one in personam, is bereft of all practical force, if the decree in personam is conclusive and must be enforced by the courts of the situs," and that such a doctrine would result in practically depriving a state of that exclusive control over its real estate which has always been accorded. Justice Garrison concurred upon the ground that the decretal order was only ancillary to the divorce suit, and "did not possess any element of a judgment upon the issue submitted to the court of decision, which was whether the marriage between the parties should be dissolved." Justice Van Syckel, in a dissenting opinion, said that the New York judgment

was conclusive as to the right of the wife to have him execute a mortgage on the New Jersey land, and that, since the courts of New Jersey would have afforded such relief if the action had been brought in that state, the judgment imposed an obligation upon the husband, which could be enforced in New Jersey by the intervention of a court of equity there. In this connection, however, he says: "The question is whether our court of equity will establish a lien upon the New Jersey land, so as to give effect to the New York decree. It may be conceded that the lex fori must apply to the remedy to enforce the New York judgment in our courts. Harker v. Brink, 24 N. J. Law, 333; Garr v. Stokes, 16 N. J. Law, 404; Armour v. Michael, 36 N. J. Law, 92. While we will give full faith and credit to the New York judgment, we cannot be asked to give greater efficacy to a decree for alimony made in New York than we can give to a like decree made in our own courts. For instance, if the common law prevailed here, we would enforce the New York decree for alimony only according to the common-law practice, for that would exhaust our powers in that respect. * * * It being competent for our courts to enforce such a decree made in our own courts by establishing it as a lien on lands, we cannot refuse like relief in this case on the extraterritorial judgment. Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; McElmoyle v. Cohen, 13 Pet. (U. S.) 312, 10 L. Ed. 177."

It will be seen, therefore, that neither the opinion of the majority nor of the minority of the New Jersey court in Bullock v. Bullock would warrant the granting of the relief sought in this case, since the appellee is asking the court to give effect to a decree of the Washington court, which it would not enforce, if it had been rendered in a court of this state, and that, if the view expressed by Justice Garrison is correct, as to which we expresss no opinion, the decree adjudging the land to Mrs. Fall is only of the nature of a decretal order, ancillary to the subject-matter of the suit, which was the matrimonial status, and is not such a judgment as is entitled to full faith and credit under the Constitution and laws of the United States. From a consideration of these authorities, and upon principle, it seems clear that a decree of a court of chancery in a foreign state, acting upon a person within its jurisdiction and directing him to make a conveyance of lands in this state, in no wise affects the title to the land. The decree and order acts only upon the person, and, if obedience to its mandate is refused, it can only be enforced by the means which have from time immemorial been the weapons of a court of chancery. To say that the decree binds the conscience of the party, so that persons to whom he may convey the land thereafter take no title, is the same as saying that the decree affects the title, which is beyond the power of the courts of another state to do. The transfer and devolution of title to real estate within the limits of a state is entirely subject to the laws of that state, and no interference with it can be permitted by other states. Watts v. Waddle, 6 Pet. (U. S.) 389, 8 L. Ed. 437;

Davis v. Headley, 22 N. J. Eq. 115; Clarke v. Clarke, 178 U. S. 186, 20 Sup. Ct. 873, 44 L. Ed. 1028; Wimer v. Wimer, supra; Bowdle v. Jencks, 18 S. D. 80, 99 N. W. 98; Manton v. J. F. Seiberling & Co., 107 Iowa, 534, 78 N. W. 194. The law will not permit that to be done indirectly which cannot be done directly, and, if the courts of other states can so adjudicate the rights of parties to land in this state that a title apparently clear upon the official records could be made null and void by its action "upon the conscience" of the holder of the legal title, the recording acts of this state would cease to afford protection to purchasers of land, and thus the title in fact be affected, and the power of the state over the transfer and devolution of lands interfered with. If the Washington decree bound the conscience of E. W. Fall, so that when he left the jurisdiction of that state any deed that he might make would be absolutely void, and had he sold the land to an innocent purchaser, who had inspected the records and found that he was the owner in fee of an undivided one-half interest to the premises, such purchaser, though relying on the laws of this state for his protection, would receive no title. This is the contention of the appellee, carried to its ultimate conclusion; and, if this is correct, the action of the court of another state directly interferes with the operation of the laws of this state over lands within its sovereignty.

Under the laws of this state the courts have no power or jurisdiction in a divorce proceeding, except as derived from the statute providing for such actions, and in such an action have no power or jurisdiction to divide or apportion the real estate of the parties. Nygren v. Nygren, 42 Neb. 408, 60 N. W. 885; Brotherton v. Brotherton, 14 Neb. 186, 15 N. W. 347; Cizek v. Cizek, 69 Neb. 800, 96 N. W. 657, 99 N. W. 28; Aldrich v. Steen, 71 Neb. 33, 98 N. W. 445, 100 N. W. 311. In the Cizek Case, Cizek brought an action for divorce, and his wife filed a cross-bill and asked for alimony. The court dismissed the husband's bill, found in favor of the wife, and by a stipulation of the parties set off to the wife the homestead and ordered her to execute to the husband a mortgage thereon, thus endeavoring to make an equitable division of the property. Afterwards, in a contest arising between the parties as to the right of possession of the property, the decree was pleaded as a source of title in the wife; but it was held that that portion of the decree which set off the homestead to the wife was absolutely void and subject to collateral attack, for the reason that no jurisdiction was given to the district court in a divorce proceeding to award the husband's real estate to the wife in fee as alimony. The courts of this state in divorce proceedings must look for their authority to the statute, and so far as they attempt to act in excess of the powers therein granted their action is void and subject to collateral attack. A judgment or decree of the nature of the Washington decree, so far as affects the real estate, if rendered by the courts of this state, would be void. Is it our duty to give effect to this decree under the full faith and credit clause of the Consti-

tution of the United States? "These provisions of the Constitution and laws of the United States are necessarily to be read in the light of some established principles which they were not intended to overthrow. They give no effect to judgments of a court which had no jurisdiction of the subject-matter or of the parties, * * * and they confer no new jurisdiction on the courts of any state. * * * Nor do these provisions put the judgments of other states upon the footing of domestic judgments to be enforced by execution, but they leave the manner in which they may be enforced to the law of the state in which they are sued on, pleaded, or offered in evidence." Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123. The provision of the Constitution establishes a rule of evidence, rather than of jurisdiction. Weaver v. Cressman, 21 Neb. 675, 33 N. W. 478; Hanley v. Donoghue, 116 U. S. 1, 6 Sup. Ct. 242, 29 L. Ed. 535; Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239.

We know of no rule which compels us to give to a decree of the courts of Washington a force and effect we would deny to a decree of our own courts upon the same cause of action. We must accord full faith and credit to the divorce decree, since the Washington court had jurisdiction to render it; but we are not compelled to recognize a decree affecting the title of E. W. Fall and his grantees, in an action where he is not in court by personal service, and where the act directed by the Washington court is in opposition to the public policy of this state in relation to the enforcement of the duty of marital support. Anglo-American Provision Co. v. Davis Provision Co., 191 U. S. 373, 24 Sup. Ct. 92, 48 L. Ed. 225; Wisconsin v. Pelican Ins. Co., supra; Lynde v. Lynde, 181 U. S. 183, 21 Sup. Ct. 555, 45 L. Ed. 810; McElmoyle v. Cohen, 13 Pet. (U. S.) 312, 10 L. Ed. 177; Bullock v. Bullock, 51 N. J. Eq. 444, 27 Atl. 435; Andrews v. Andrews, 188 U. S. 14, 23 Sup. Ct. 237, 47 L. Ed. 366. In order to vest Mrs. Fall with any right, title, or interest in and to her husband's land in Nebraska by virtue of the Washington decree, it was absolutely necessary that the decree be carried into effect by that court by compelling a conveyance from her husband. Neither the decree nor the commissioner's deed conferred any right or title upon her. The decree is inoperative to affect the title to the Nebraska land, and is given no binding force or effect, so far as the courts of this state are concerned, by the provisions of the Constitution of the United States with reference to full faith and credit. Since the decree upon which the plaintiff bases her right to recover did not affect the title to the land, it remained in E. W. Fall until divested by operation of law or by his voluntary act. He has parted with it to Elizabeth Eastin, and whether any consideration was ever paid for it or not is immaterial, so far as the plaintiff is concerned, for she is in no position to question the transaction, whatever a creditor of Fall might be able to do.

In whatever manner the result of our conclusion may affect the parties to this controversy, it is our duty to sustain the rights of the state to sovereignty over the land within its borders, and to resist an attempt to convey and set apart real estate in Nebraska by the court of another state, when not acting upon and through the person of the owner, when under its jurisdiction and by virtue of the proper powers of a court of chancery. It appears that Mrs. Fall has paid taxes and interest and made other outlays for the benefit of the property, for which she should be reimbursed.

The former judgment of this court is vacated, and the cause reversed, and remanded to the district court, with directions to proceed in accordance with this opinion, and, if plaintiff so desires, to take an accounting of the rents and profits and disbursements, and to render such decree as may be equitable.[16]

FISHER v. FIELDING.

(Supreme Court of Errors of Connecticut, 1895. 67 Conn. 91, 34 Atl. 714, 32 L. R. A. 236, 52 Am. St. Rep. 270.)

Action on a judgment obtained in England. Judgment for plaintiffs, and defendant appeals.

BALDWIN, J.[17] * * * Three special defenses were pleaded, and, on demurrer, held insufficient. The second of these set up that the defendant was served with the process in the English action while transiently stopping at an hotel in Birmingham, and when he was about

[16] In a dissenting opinion, Sedgwick, C. J., held: (1) That by the law of Nebraska a wife had an equity in the land of her husband during coverture, alimony being determined by a consideration of the amount which she contributed towards the accumulation of the common property of the family; that these equities were personal rights, and went with their persons to the state of Washington, whose courts, therefore, had jurisdiction both of the marriage status and of the equities existing between the parties in this land. (2) That the method by which the wife gets her equitable share of the property—whether by the process of a judgment, lien, and sale (the method followed in Nebraska), or by a direct determination by the court of the just and equitable interest that each has in the joint property (the method pursued in Washington)—related merely to procedure, and that, the public policy of a state not being interested in forms of procedure, the transfer of the lands of the husband directly to the wife in a divorce proceeding would not be opposed to the public policy of Nebraska. (3) That defendant, who claimed through Mr. Fall, had constructive notice of Mrs. Fall's equities in the land, and therefore took the land subject to those equities.

As to the jurisdiction of courts of equity with respect to foreign land, see J. H. Beale, Jr., "Equitable Interests in Foreign Property," 20 Harv. Law Rev. 382–397; Dicey, Conflict of Laws, 203–207; Westlake, Priv. Int. Law, 210–212; Foote, Priv. Int. Jurispr., 184–197. See, also, 69 L. R. A. 673–697; 67 Am. Dec. 95–105. As to the nature of equity jurisdiction in general, see Ames' Cases on Equity Jurisdiction, 1–35.

[17] Only so much of the opinion is given as relates to the question of jurisdiction. The dissenting opinion of Hamersley, J., has been omitted.

to take his departure for home, and that such service was so made and timed for the purpose of embarrassing him, and obtaining an unjust and unfair advantage, by preventing his having a fair opportunity to make his defense unless he prolonged his stay abroad indefinitely. The rights of sovereignty extend to all persons and things, not excepted by some special privilege, that are within the territory of the sovereign. An alien friend, however transient his presence may be, is entitled to a temporary protection, and owes in return a temporary allegiance. Story, Confl. Laws, §§ 18, 22, 541; Carlisle v. United States, 16 Wall. (U. S.) 147, 154, 21 L. Ed. 426. The fact that the defendant was a foreigner, making but a brief stay in the country, and on the point of leaving it for his own, did not deprive the courts of England of all jurisdiction over him. The Roman maxim, "Actor sequitur forum rei," if it has any force in English or American jurisprudence, operates as a permission, rather than a command. A man who is absent from his domicile can still be sued there, but he can also be sued wherever he is found, if personally served with legal process within the jurisdiction where the plaintiff seeks his remedy. The action must be brought, indeed, in a court to which the defendant is subject, and subject at the time of suit; but, unless protected by treaty stipulation or official privilege, he is subject to every court within reach of whose process he may enter. The Roman law allowed a nonresident to be sued where he had established a temporary seat of business, and, in some cases, where he had simply contracted a single obligation. Dig. V, 1, "De judiciis, et ubi quisque agere vel conveniri debeat," 2, 19, 24. The common law, so far as concerns the enforcement of a pecuniary liability, goes farther, and operates alike upon every private individual who may be found, however transiently, within the territory where it is in force. Whart. Confl. Laws, § 653. An English court will take cognizance of an action on a contract, wherever made, and between whatever parties. Holland, Jur. (5th Ed.) 349. So the courts of this state have always regarded transitory actions as following the person, and entertained them against foreigners found within our jurisdiction, whether brought by a foreigner or a citizen. Place v. Lyon, Kirby (Conn.) 404, 406; Potter v. Allin, 2 Root (Conn.) 63, 66, 67. "Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another, independent country." Sirdar Gurdyal, Singh v. Rajah of Faridkote, [1894] App. Cas. 670, 683. The several states of the United States are, as respects their relations to each other, excepting only such of these as are regulated by the Constitution of the United States, independent and foreign sovereignties. Buckner v. Finley, 2 Pet. (U. S.) 586, 590, 7 L. Ed. 528; Pennoyer v. Neff, 95 U. S. 714, 722, 24 L. Ed. 565. The effect in one of them of a suit brought or judgment rendered in another is precisely the same as if the latter

were a foreign country, except so far as article 4, § 1, of the Constitution of the United States may have established a different rule. Hatch v. Spofford, 22 Conn. 485, 498, 58 Am. Dec. 435; M'Elmoyle v. Cohen, 13 Pet. (U. S.) 312, 324, 10 L. Ed. 177; Thompson v. Whitman, 18 Wall. (U. S.) 457, 461, 21 L. Ed. 897. Notwithstanding that provision of the Constitution, and the statute passed to enforce it (Rev. St. U. S. § 905), the jurisdiction of a state court whose judgment is brought in question in another state is always open to inquiry. In that respect, every state court is to be regarded as a foreign court. Hall v. Lanning, 91 U. S. 160, 165, 23 L. Ed. 271; Grover & Baker Sewing Mach. Co. v. Radcliffe, 137 U. S. 287, 294, 298, 11 Sup. Ct. 92, 34 L. Ed. 670.

The courts of this state have never before had occasion to pass directly upon the defenses which may be open here to an action upon a judgment of a court of a foreign country, but they have often been called to consider the effect of legal proceedings instituted in one of the United States against a citizen of another; and the right to secure jurisdiction over a nonresident, who is served with process while transiently in the state, has been uniformly upheld. Hart v. Granger, 1 Conn. 154, 165, 173; Wood v. Watkinson, 17 Conn. 500, 504, 44 Am. Dec. 562; Hatch v. Spofford, 22 Conn. 485, 58 Am. Dec. 433; Bishop v. Vose, 27 Conn. 1, 11, 12; Duryee v. Hale, 31 Conn. 217, 223; Easterly v. Goodwin, 35 Conn. 273, 278; O'Sullivan v. Overton, 56 Conn. 102, 103, 14 Atl. 300. These decisions are based on what has been deemed an accepted principle of international law, applicable between the states, on no other ground than that they are, as to such a question, in the position of foreign nations to each other. Grover & Baker Sewing Mach. Co. v. Radcliffe, 137 U. S. 287, 298, 11 Sup. Ct. 92, 34 L. Ed. 670; Lazier v. Westcott, 26 N. Y. 146, 154, 82 Am. Dec. 404.

The English court having, then, jurisdiction of the parties, and presumably of the action and the subject-matter, as to which no question has been made, there is nothing in the defense now pleaded, that the suit was brought, as it was and when it was, "for the purpose of embarrassing and impeding the defendant, and to prevent his having a fair opportunity to defend said suit unless he prolonged his stay indefinitely at said Birmingham, and thereby said plaintiff sought to obtain an unjust and unfair advantage over said defendant." Where there is a legal right to do a certain act, the motive which induces the exercise of the right is of no importance. McCune v. Norwich City Gas Co., 30 Conn. 521, 524, 79 Am. Dec. 278; Occum Co. v. A. & W. Sprague Mfg. Co., 34 Conn. 529, 540. "Nullus videtur dolo facere, qui suo jure utitur." The act complained of having been fully stated, and being one which the law permitted, whatever advantage it gave the plaintiffs could be neither unjust nor unfair, and these epithets are therefore of no effect. Middletown v. Boston & N. Y. A. L. R. Co., 53 Conn. 351, 359, 5 Atl. 706. They had the right to sue the defendant where they found him, or at his domicile in Connecticut, and, in the

choice of the forum, were free to consult their own convenience, without regard to any loss he might sustain from "the law's delays." Lovell v. Hammond Co., 66 Conn. 500, 512, 34 Atl. 511. * * *

There is no error in the judgment appealed from.[18]

FEYERICK v. HUBBARD.

(King's Bench Division, 1902. 71 L. J. K. B. 509.)

WALTON, J.[19] In this case the plaintiffs sue the defendant for £1,208. 19s. 1d., money alleged to be due from the defendant to the plaintiffs under a final judgment of the Tribunal of Commerce of Ghent, in the kingdom of Belgium, bearing date November 15, 1900. The question is whether this judgment is binding on the defendant. The defendant is not a Belgian subject—neither domiciled nor resident in Belgium; nor has he been served with process in Belgium; but it was proved that judgment was delivered by the Belgian court—a final judgment—and that all the requisites of Belgian law had been duly complied with. It is therefore a regular judgment duly obtained. The question is whether it is binding on the defendant.

The ground on which it is said to be binding is that by clause 11 of the contract made between the plaintiffs and the defendant all disputes between the parties were to be referred to the Belgian jurisdiction. This contract is dated September 7, 1895, and appears to have been executed by the defendant at Ghent on that date. It is said that, as by the terms of that contract, for breach of which the plaintiffs seek to recover the damages awarded by the Belgian court, the defendant agreed to submit to the Belgian jurisdiction, therefore he is bound by the decision of the Belgian court.

There is no authority directly in point—that is to say, it has never been decided in any case that where a contract, on which a cause of action and proceedings thereon arise, submits all disputes to the jurisdiction of a foreign tribunal, that fact alone is sufficient to render the foreign judgment binding. But in the case of Rousillon v. Rousillon [1880] 49 L. J. Ch. 338, at page 344, 14 Ch. D. 351, at page 371, Mr. Justice Fry reviewed all the cases on this subject, and stated his conclusions. After citing the case of Schibsby v. Westenholz [1870], 40 L. J. Q. B. 73, L. R. 6 Q. B. 155, he continues thus: "What are the circumstances which have been held to impose upon the defendant the duty of obeying the decision of a foreign court? Having regard to that case, and to Copin v. Adamson, 43 L. J. Ex. 161, L. R. 9 Ex. 345, they

[18] Service in another state from the one in which the remedy is sought does not confer personal jurisdiction. Bank of Horton v. Knox, 133 Iowa, 443, 109 N. W. 201 (1906). As to jurisdiction of English courts, see Dicey, Conflict of Laws, 217–249.

[19] The opinion only is given.

may, I think, be stated thus. The courts of this country consider the defendant bound where he is a subject of the foreign country in which the judgment has been obtained; where he was resident in the foreign country when the action began; where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; where he has voluntarily appeared; where he has contracted to submit himself to the forum in which the judgment was obtained, and, possibly, if Becquet v. MacCarthy [1831] 2 B. & Ad. 951, be right, where the defendant has real estate within the foreign jurisdiction, in respect of which the cause of action arose whilst he was within that jurisdiction."

That is a classification by Mr. Justice Fry of the cases where a party is bound by the judgment of a foreign court, and one of those cases is "where he has contracted to submit himself to the forum in which the judgment was obtained." If so, the plaintiffs are entitled to judgment in this case. It was not absolutely necessary for Mr. Justice Fry to decide this point in Rousillon v. Rousillon, 49 L. J. Ch. 338, at page 344, 14 Ch. D. 351, at page 371. In support of his opinion he refers to Copin v. Adamson, 43 L. J. Ex. 161, L. R. 9 Ex. 345. That was an action on a judgment of the Court of the Tribunal of Commerce in the Department of the Seine. The defendant pleaded that he was not at any time before the judgment resident or domiciled in France or within the jurisdiction of the court, or subject to French law; that he was never served with any process or summons, and had no notice or knowledge of any process or summons nor any opportunity of defending himself. To this plea the plaintiff replied that the defendant was the holder of shares in a French company having its place of business and legal domicile in Paris, in the department of the Seine, and within the jurisdiction of the Court of the Tribunal of Commerce of that department, and thereby was by the law of France subject to all the liabilities, rights, and privileges belonging to the holders of shares in the company, and in particular to the regulations, conditions, and stipulations contained in the statutes and articles of association by which it was provided and agreed that all disputes which might arise during the liquidation of the company between the shareholders and the company with respect to the affairs of the company, should be submitted to the jurisdiction of the competent tribunal of the department of the Seine, and that every shareholder who should provoke a contest must elect a domicile at Paris, and that, in default of election, election should be made of full right at the office of the Imperial procurator of the civil tribunal of the department in which the office of the company was situate, and that all summonses, or notices of process, should be validly and effectually served at the domicile formally or impliedly chosen; that the company was declared bankrupt, and the defendant provoked a contest within the meaning of the statutes or articles; that, the defendant not having elected a domicile, the office of the procurator of the civil tribunal of the department of the Seine became his domicile, where all process was duly served.

It was held by the Court of Exchequer, consisting of Chief Baron Kelly, Baron Amphlett, and Baron Pigott, that that replication was good. Baron Amphlett, delivering the judgment of himself and Baron Pigott, said: "I apprehend that a man may contract with others that his rights shall be determined not only by foreign law, but by a foreign tribunal, and thus by reason of his contract, and not of any allegiance absolute or qualified, would become bound by that tribunal's decision." The facts in Copin v. Adamson, 43 L. J. Ex. 161, L. R. 9 Ex. 345, might be distinguished from those in this case, and the decision might, I think, have been put on other grounds; but it was in fact put upon the ground that a man may contract with another that his rights shall be decided by a foreign tribunal. That case was affirmed in the Court of Appeal [1875], 45 L. J. Ex. 15, 1 Ex. D. 17, where Lord Cairns, in giving judgment, said: "The Court of Exchequer have held that a good replication. I am clearly of the same opinion. It appears to me that, to all intents and purposes, it is as if there had been an actual and absolute agreement by the defendant."

Therefore Copin v. Adamson, 43 L. J. Ex. 161, L. R. 9 Ex. 345, is practically a decision that a defendant in an action on a foreign judgment agreeing to be bound by the judgment of the foreign court is bound by that judgment although not resident, served, or domiciled within the jurisdiction of the foreign court. If so, the opinion of Mr. Justice Fry in Rousillon v. Rousillon, 49 L. J. Ch. 338, at page 344, 14 Ch. D. 351, at page 371, is well founded, and I am bound by it. Here the defendant agreed that he would refer all disputes to the Belgian jurisdiction—that is, that he would be bound by the decision of the Belgian tribunal—and if the cases cited above were rightly decided, the judgment in Belgium is binding on the defendant. I see nothing in the Belgian proceedings contrary to natural justice. There must therefore be judgment for the plaintiffs.

Judgment accordingly.

EMANUEL v. SYMON.

(Court of Appeal, 1908. 77 L. J. K. B. 180, 1 K. B. 302.)

Appeal by the defendant from the judgment of Channell, J., in an action tried without a jury.

The plaintiffs sought to recover from the defendant the sum of £1,281. 4s. 11d. on a judgment obtained in the Supreme Court of Western Australia on July 25, 1902, or, in the alternative, on accounts taken on the dissolution of a partnership.

In 1895 the defendant verbally entered into partnership with certain persons (who at the time the action was brought in Western Australia were represented by the plaintiffs)—all the parties being then resident in Western Australia—to work a gold mine situated in that colony, each

of the partners having an equal share. According to the plaintiffs the partnership was in existence in 1901, when, it being seen that the adventure was not successful, it was decided that steps should be taken for a dissolution and an account. For this purpose a suit was commenced in the colony in 1901. At that time the defendant did not carry on business or reside in Western Australia, having left the colony in 1899 and taken up his residence in England. The writ in the Western Australian action was served on the defendant in England on November 13, 1901, and thereafter he was from time to time kept informed of the proceedings; but he did not enter an appearance in that action or take any part therein. In the action a decree was made dissolving the partnership as from July 25, 1902, and ordering a sale of the mine. Under the decree accounts were taken which shewed a deficiency, after crediting the partnership with the sale of the mine, of £7,867. 9s. 9d., to be met by the partners. Of that amount the defendant's one-sixth share was £1,281. 4s. 11d., the amount sued for.

By his defence the defendant alleged that at all material times he was a British subject domiciled in England; that neither at the date of the commencement of the suit in Western Australia nor at any time during its continuance was he resident or domiciled in that colony or subject to the jurisdiction of its courts; that he did not appear to the writ in that action or agree to submit to the jurisdiction of the colonial court, and that the decree of that court was consequently not binding upon him.

In his evidence the defendant stated that the partnership was dissolved in 1896; but upon the whole of the evidence Channell, J., came to the conclusion that the dissolution did not take place in that year, and that the partnership continued until at least 1899, in which year two of the partners assigned their shares in the partnership to one of the other partners, who died in 1901, in which year the plaintiffs and, as they alleged, the defendant were the members of the partnership.

Channell, J., held that the defendant, by joining the partnership for working the mine in Western Australia, had impliedly agreed that partnership disputes, whether arising during the continuance or on the termination of the partnership, should be settled in the courts of Western Australia, and that, having submitted to their jurisdiction, he was bound by the judgment.

The defendant appealed.

Lord ALVERSTONE, C. J.[20] In this case I am unable to agree with the decision to which my Brother Channell has come. Out of respect to his very great learning and the weight of his opinion, I should have wished to have taken time to consider my judgment if I had felt that further consideration would have enabled me to understand the authorities better than I understand them now. But, having regard to the fact that

[20] The concurring opinions of Buckley and Kennedy, L. JJ., have been omitted.

the point is one which has been the subject of a great deal of discussion in the courts for a very considerable time, I think we should give our judgment at once.

My Brother Channell based his judgment upon this proposition: "The defendant, by joining this partnership for the working of the mine in Western Australia, must, I think, be taken to have contracted that all partnership disputes, if any, should be determined by the courts of that country, and thereby subjected himself to the jurisdiction of those courts, just as in Copin v. Adamson, 43 L. J. Ex. 161, L. R. 9 Ex. 345, it was held that a man who took shares in a French company and expressly agreed that disputes as to shares should be settled in the manner provided by the company's articles, that is, in the courts of France, so subjected himself." If that proposition, which is the root of the judgment, is right, this judgment should be affirmed; but in my opinion it goes a great deal too far. I think it goes further than is consistent with, if not the direct decision, at any rate the considered opinions of very eminent judges in courts which are either binding upon us or of such high authority that we ought not to adopt that proposition in its breadth unless we are able to distinguish those opinions. The proposition was supported upon two grounds: The first that the defendant had become the owner of real property in Western Australia; the second that he had entered into a partnership, which partnership was to manage that property, and to deal with it as real estate. Counsel for the plaintiffs has based his argument mainly on the second ground. Now it cannot be disputed that the ownership of property in a country gives certain rights and involves submission to the jurisdiction of that country to a certain extent. That was decided in the case of Douglas v. Forrest, 6 L. J. (O. S.) C. P. 157, 164, 4 Bing. 686, 703, and the principle was recognized by the House of Lords in the case of London & North-Western Railway v. Lindsay [1858] 3 Macq. H. L. 99. Therefore it is clear that foreign courts have jurisdiction to deal with the property and the rights of the person in the property itself, but that jurisdiction is limited. It by no means follows that there is jurisdiction for all purposes. It has been, however, suggested, and I think with some warrant of authority, that Becquet v. MacCarthy, 2 B. & Ad. 951, was a case in which the jurisdiction proceeded on the basis of the ownership of property. But Mr. Dicey in his book on Conflict of Laws has indicated in a note on page 373 that it is very doubtful whether that case properly understood rested on the ownership of property: whether it did not rest on the fact that the defendant there was the holder of an office. I will only refer to the case of Sirdar Gurdyal Singh v. Rajah of Faridkote, [1894] A. C. 670, where Lord Selborne in a passage at page 685, to my mind, disposed once and for all of the contention that Becquet v. MacCarthy, 2 B. & Ad. 951, can be relied upon as being an authority laying down the proposition that the mere possession of property is sufficient to give a general jurisdiction in the foreign court. Certainly it seems to me, having regard to the way in which Becquet v.

MacCarthy, 2 B. & Ad. 951, has been treated, that it can only be regarded as an authority if it is based on the principle which Lord Selborne pointed out in the passage to which I have just referred.

The second ground upon which, as I have said, counsel for the plaintiff mainly based his case was that there was a contract of partnership entered into between these people in Western Australia, and that it must be inferred from that contract of partnership that they had agreed that all disputes with regard to that partnership should be finally determined in the Western Australian courts. He went so far as to contend that, even if the defendant had immediately left Western Australia and had never been there again, everything connected with the partnership, or flowing from it, must be subject to the jurisdiction of the Australian courts. I do not wish to enlarge on the consequences of such a proposition, but it is necessary for him to contend that the mere fact of entering into the partnership in Western Australia in the year 1896, remaining there until 1899, was sufficient to give the court jurisdiction against this particular defendant. The writ was not issued until November 13, 1901. Now, if the case is based upon the contract of partnership—the contractual obligations which the defendant has entered into —in my opinion the point is covered by authority or opinion of such great weight that we ought not to disregard it. In the case of Schibsby v. Westenholz, 40 L. J. Q. B. 73, L. R. 6 Q. B. 155, 163, Mr. Justice Blackburn had said in the course of his judgment: "If at the time when the obligation was contracted the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of that country bound them; though before finally deciding this we should like to hear the question argued." That passage is commented upon by Lord Selborne in Sirdar Gurdyal Singh v. Rajah of Faridkote [1894] A. C. 670, in the following passage, where he says: "The learned judge had not to consider whether it was a legitimate consequence from this, that they would be bound to submit, on the footing of contract or otherwise, to any assumption of jurisdiction over them in respect of such a contract, by the tribunals of the country in which the contract was made, at any subsequent time, although they might be foreigners resident abroad." Then he proceeds to express his opinion that such an obligation could not be implied. Speaking for myself, I think it is far too wide a proposition that, simply because there is a contract of partnership, or a contract of any other kind, made in a foreign country, it of necessity follows that all the contracting parties have submitted to the jurisdiction of the foreign tribunal for all purposes in respect of any question arising out of the contract or otherwise. The question was, to a certain extent, dealt with, although not directly, in the case of Copin v. Adamson, 43 L. J. Ex. 161, L. R. 9 Ex. 345. In that case the judgment of the Court of Exchequer, and of the Exchequer Chamber, was in favor of the plaintiffs, on the ground that there was a contract by the then defendant whereby he had agreed to be bound in terms by the decision of the foreign trib-

unal. Lord Cairns, when the point was raised in the Exchequer Chamber, decided the case entirely upon that point. The plaintiffs had also raised a second point, which was one very like the point urged in this case on behalf of the plaintiffs—namely, that the defendant, by becoming a shareholder, had submitted to the jurisdiction of the French courts. Baron Amphlett, in giving the judgment of himself and Baron Pigott in that case, said: "I now proceed to consider the second replication, which is silent as to the statutes or articles of association, but simply alleges that according to French law the members of the company were bound to elect a domicile; and that, according to French law, upon default a domicile would be elected for them at a public office, where process might be served, and that they would be bound thereby. I confess I cannot find a case which has gone so far as to hold a defendant liable, under such circumstances, upon a foreign judgment obtained as this was, without any knowledge on his part of the proceedings. Can it be said that an Englishman, for example, who buys a share in a foreign company on the London Stock Exchange thereby becomes necessarily bound by any decision to which the foreign tribunal may come upon a matter affecting his interests?" I do not say that that is express authority, but it seems to me to shew that very learned Judges were not prepared to accept the principle that the mere fact of entering into contracts in a foreign country, or owning property in a foreign country, is sufficient to make the person contracting or owning property in a foreign country amenable to the laws of that country under all circumstances. When the case came before the Exchequer Chamber, Lord Cairns, in giving the judgment of that court, said they affirmed the decision on the ground on which the majority in the court below had decided it, and did not express any opinion on the other point raised. Under these circumstances I think that the proposition as stated by Mr. Justice Channell is too wide. In my opinion, something more than the mere ownership of property, or the entering into a contract of partnership, is required in order to enable a foreign judgment to be used as res judicata against a man who has ceased to reside in the country, who was not resident in the country at the time that the proceedings were instituted, and who has not submitted to the jurisdiction of its courts. I think, therefore, that this appeal must be allowed.

GROVER & BAKER SEWING MACH. CO. v. RADCLIFFE.

(Supreme Court of the United States, 1890. 137 U. S. 287, 11 Sup. Ct. 92, 34 L. Ed. 670.)

Error to the Court of Appeals of Maryland.

This was an action brought in the circuit court of Cecil county, Md., by the Grover & Baker Sewing Machine Company, a Massachusetts corporation, against James Benge and John Benge, who were then

citizens of Delaware, by summons and attachment on warrant, which was served on William P. Radcliffe, garnishee. This suit was instituted to recover the sum of $2,300 on a judgment obtained by plaintiff in the court of common pleas in and for the county of Chester, in the state of Pennsylvania. The judgment was entered by the prothonotary of the court upon a bond executed by defendants, one of whom was at the time a citizen of Pennsylvania, and the other (John Benge) a citizen of Maryland, authorizing "any attorney of any court of record in the state of New York or any other state to confess judgment." Under the law of the state of Pennsylvania the prothonotary of any court of record within the commonwealth was authorized to enter judgment upon such a bond without the agency of an attorney or declaration filed. A judgment for the defendant was affirmed by the Court of Appeals of Maryland.[21]

FULLER, C. J. The Maryland circuit court arrived at its conclusion upon the ground that the statute of Pennsylvania relied on did not authorize the prothonotary of the court of common pleas of that state to enter the judgment; and the court of appeals of Maryland reached the same result upon the ground that the judgment was void as against John Benge, because the court rendering it had acquired no jurisdiction over his person. It is settled that notwithstanding the provision of the Constitution of the United States, which declares that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state" (article 4, § 1), and the acts of Congress passed in pursuance thereof (1 Stat. 122; Rev. St. § 905), and notwithstanding the averments in the record of the judgment itself, the jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding; that the jurisdiction of a foreign court over the person or the subject-matter, embraced in the judgment or decree of such court, is always open to inquiry; that, in this respect, a court of another state is to be regarded as a foreign court; and that a personal judgment is without validity if rendered by a state court in an action upon a money demand against a nonresident of the state, upon whom no personal service of process within the state was made, and who did not appear. D'Arcy v. Ketchum, 11 How. (U. S.) 165, 13 L. Ed. 648; Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897; Hall v. Lanning, 91 U. S. 160, 23 L. Ed. 271; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565. The rule is not otherwise in the state of Pennsylvania, where the judgment in question was rendered (Guthrie v. Lowry, 84 Pa. 533; Scott v. Noble, 72 Pa. 115, 13 Am. Rep. 663; Noble v. Thompson Oil Co., 79 Pa. 354, 21 Am. Rep. 66; Steel v. Smith, 7 Watts & S. [Pa.] 447), nor in the state of Maryland, where the action under review was brought upon it (Bank of United States v. Merchants' Bank of Baltimore, 7 Gill [Md.] 415; Clark v. Bryan, 16 Md. 171; Weaver v. Boggs, 38 Md.

[21] This statement of facts has been substituted for that of the original report.

255). And the distinction between the validity of a judgment rendered in one state, under its local laws upon the subject, and its validity in another state, is recognized by the highest tribunals of each of these states. Thus, in Steel v. Smith, 7 Watts & S. (Pa.) 447, it was decided, in 1844, that a judgment of a court of another state does not bind the person of the defendant, in another jurisdiction, though it might do so under the laws of the state in which the action was brought, and that the act of Congress does not preclude inquiry into the jurisdiction, or the right of the state to confer it. The action was brought on a judgment rendered in Louisiana, and Mr. Chief Justice Gibson, in delivering the opinion of the court, said: "The record shows that there was service on one of the joint owners which, in the estimation of the law of the court, is service on all; for it is affirmed in Hill v. Bowman, already quoted [14 La. 445], that the state of Louisiana holds all persons amenable to the process of her courts, whether citizens or aliens, and whether present or absent. It was ruled in George v. Fitzgerald, 12 La. 604, that a defendant, though he reside in another state, having neither domicile, interest, nor agent in Louisiana, and having never been within its territorial limits, may yet be sued in its courts by the instrumentality of a curator appointed by the court to represent and defend him. All this is clear enough, as well as that there was in this instance a general appearance by attorney, and a judgment against all the defendants, which would have full faith and credit given to it in the courts of the state. But that a judgment is always regular when there has been an appearance by attorney, with or without warrant, and that it cannot be impeached collaterally for anything but fraud or collusion, is a municipal principle, and not an international one having place in a question of state jurisdiction or sovereignty. Now, though the courts of Louisiana would enforce this judgment against the persons of the defendants, if found within reach of their process, yet, where there is an attempt to enforce it by the process of another state, it behooves the court whose assistance is invoked to look narrowly into the constitutional injunction, and give the statute to carry it out a reasonable interpretation." 7 Watts & S. (Pa.) 449, 450.

Referring to section 1307 of Mr. Justice Story's Commentaries on the Constitution, and the cases cited, to which he adds Benton v. Burgot, 10 Serg. & R. (Pa.) 240, the learned judge inquired: "What, then, is the right of a state to exercise authority over the persons of those who belong to another jurisdiction, and who have perhaps not been out of the boundaries of it?" (7 Watts & S. [Pa.] 450), and quoted from Vattel, Burge, and from Mr. Justice Story (Confl. Laws, c. 14, § 539), that "'no sovereignty can extend its process beyond its own territorial limits, to subject other persons or property to its judicial decisions. Every exertion of authority beyond these limits is a mere nullity, and incapable of binding such persons or property in other tribunals,'" and thus continues: "Such is the familiar, reasonable, and

just principle of the law of nations; and it is scarce supposable that the framers of the Constitution designed to abrogate it between states which were to remain as independent of each other, for all but national purposes, as they were before the Revolution. Certainly it was not intended to legitimate an assumption of extraterritorial jurisdiction which would confound all distinctive principles of separate sovereignty; and there evidently was such an assumption in the proceedings under consideration. * * * But I would perhaps do the jurisprudence of Louisiana injustice, did I treat its cognizance of the defendants as an act of usurpation. It makes no claim to extraterritorial authority, but merely concludes the party in its own courts, and leaves the rest to the Constitution as carried out by the act of Congress. When, however, a creditor asks us to give such a judgment what is in truth an extraterritorial effect, he asks us to do what we will not, till we are compelled by a mandate of the court in the last resort." 7 Watts & S. (Pa.) 451.

In Weaver v. Boggs, 38 Md. 255, it was held that suit could not be maintained in the courts of Maryland upon a judgment of a court of Pennsylvania rendered upon returns of nihil to two successive writs of scire facias issued to revive a Pennsylvania judgment of more than 20 years' standing, where the defendant had for more than 20 years next before the issuing of the writs resided in Maryland, and out of the jurisdiction of the court that rendered the judgment. The court said: "It is well settled that a judgment obtained in a court of one state cannot be enforced in the courts and against a citizen of another, unless the court rendering the judgment has acquired jurisdiction over the defendant by actual service of process upon him, or by his voluntary appearance to the suit and submission to that jurisdiction. Such a judgment may be perfectly valid in the jurisdiction where rendered, and enforced there even against the property, effects, and credits of a nonresident defendant there situated, but it cannot be enforced or made the foundation of an action in another state. A law which substitutes constructive for actual notice is binding upon persons domiciled within the state where such law prevails, and as respects the property of others there situated, but can bind neither person nor property beyond its limits. This rule is based upon international law, and upon that natural protection which every country owes to its own citizens. It concedes the jurisdiction of the court to the extent of the state where the judgment is rendered, but upon the principle that it would be unjust to its own citizens to give effect to the judgments of a foreign tribunal against them when they had no opportunity of being heard, its validity is denied." Publicists concur that domicile generally determines the particular territorial jurisprudence to which every individual is subjected. As correctly said by Mr. Wharton, the nationality of our citizens is that of the United States, and by the laws of the United States they are bound in all matters in which the United States are sovereign; but in other matters, their domicile is in the particular

state, and that determines the applicatory territorial jurisprudence. A foreign judgment is impeachable for want of personal service within the jurisdiction of the defendant, this being internationally essential to jurisdiction in all cases in which the defendant is not a subject of the state entering judgment, and it is competent for a defendant in an action on a judgment of a sister state, as in an action on a foreign judgment, to set up, as a defense, want of jurisdiction, in that he was not an inhabitant of the state rendering the judgment, and had not been served with process, and did not enter his appearance. Whart. Confl. Laws, §§ 32, 654, 660; Story, Confl. Laws, §§ 539, 540, 586. John Benge was a citizen of Maryland when he executed this obligation. The subject-matter of the suit against him in Pennsylvania was merely the determination of his personal liability, and it was necessary to the validity of the judgment at least elsewhere that it should appear from the record that he had been brought within the jurisdiction of the Pennsylvania court by service of process, or his voluntary appearance, or that he had in some manner authorized the proceeding. By the bond in question he authorized "any attorney of any court of record in the state of New York, or any other state, to confess judgment against him (us) for the said sum, with release of errors," etc. But the record did not show, nor is it contended, that he was served with process, or voluntarily appeared, or that judgment was confessed by an attorney of any court of record of Pennsylvania. Upon its face, then, the judgment was invalid, and to be treated as such when offered in evidence in the Maryland court.

It is said, however, that the judgment was entered against Benge by a prothonotary, and that the prothonotary had power to do this under the statute of Pennsylvania of February 24, 1806. Laws Pa. 1805–06, p. 347. This statute was proved as a fact upon the trial in Maryland, and may be assumed to have authorized the action taken, though under Connay v. Halstead, 73 Pa. 354, that may, perhaps, be doubtful. And it is argued that the statute, being in force at the time this instrument was executed, should be read into it and considered as forming a part of it, and therefore that John Benge had consented that judgment might be thus entered up against him without service of process or appearance in person or by attorney. But we do not think that a citizen of another state than Pennsylvania can be thus presumptively held to knowledge and acceptance of particular statutes of the latter state. What Benge authorized was a confession of judgment by any attorney of any court of record in the state of New York or any other state, and he had a right to insist upon the letter of the authority conferred. By its terms he did not consent to be bound by the local laws of every state in the Union relating to the rendition of judgment against their own citizens without service or appearance, but, on the contrary, made such appearance a condition of judgment. And even if judgment could have been entered against him, not being served and not appearing in each of the states of the Union,

in accordance with the laws therein existing upon the subject, he could not be held liable upon such judgment in any other state than that in which it was so rendered, contrary to the laws and policy of such state. The courts of Maryland were not bound to hold this judgment as obligatory either on the ground of comity or of duty, thereby permitting the law of another state to override their own. No color to any other view is given by our decisions in Johnson v. Chicago & P. Elevator Co., 119 U. S. 388, 400, 7 Sup. Ct. 254, 30 L. Ed. 447, and Hopkins v. Orr, 124 U. S. 510, 8 Sup. Ct. 590, 31 L. Ed. 523, cited for plaintiff in error. Those cases involved the rendition of judgments against sureties on restitution and appeal bonds if judgment went against their principals, and the sureties signed with reference to the particular statute under which each bond was given, nor did, nor could, any such question arise therein as that presented in the case at bar. Judgment affirmed.[22]

[22] See Ritter v. Hoffman, 35 Kan. 215, 10 Pac. 576 (1886); Teel v. Yost, 128 N. Y. 387, 28 N. E. 353, 13 L. R. A. 796 (1891); Van Norman v. Gordon, 172 Mass. 576, 53 N. E. 267, 44 L. R. A. 840, 70 Am. St. Rep. 304 (1899); Vennum v. Mertens, 119 Mo. App. 461, 95 S. W. 292 (1906); Cuykendall v. Doe, 129 Iowa, 453, 105 N. W. 698, 3 L. R. A. (N. S.) 449, 113 Am. St. Rep. 472 (1906).

"Few things are more disputable than the limits within which the courts of a country have a right to exercise jurisdiction. The plain truth is—and this holds good of England no less than of other states—that every country claims for its own courts wider extraterritorial authority than it willingly concedes to foreign tribunals." Dicey, Conflict of Laws, 29.

As to judgments in general, see 94 Am. St. Rep. 532–559; 103 Am. St. Rep. 304–330; 20 L. R. A. 668–682.

As to the territorial jurisdiction of nations and jurisdiction on the high seas, see Scott, Cases on International Law, 170–369; 46 L. R. A. 264–281; Charles N. Gregory, Jurisdiction over Foreign Ships in Territorial Waters, 2 Mich. Law Rev. 333–357.

As to discretion of a court to decline jurisdiction in a given case, see The Belgenland, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152 (1885); Logan v. Bank of Scotland, 75 L. J. K. B. 218 (1905); 59 Am. St. Rep. 870–878; 11 Cyc. 683–684.

As to jurisdiction over citizens of another state or nation, see 6 Am. St. Rep. 179–190. As to jurisdiction over absent citizens, see 53 Am. St. Rep. 179–191. See, also, Edward Q. Keasbey, Jurisdiction over Nonresidents in Personal Actions, 5 Col. Law Rev. 436–455. As to the granting of an injunction against the bringing of suits in another jurisdiction, see 59 Am. St. Rep. 879–885. As to what service is sufficient to constitute due process of law, see 50 L. R. A. 577–600.

CONTINENTAL LAW.—As to the general basis of personal jurisdiction in continental countries, see A. Pillet, Jurisdiction over Foreigners, 18 Harv. Law Rev. 325–340.

French courts are on principle incompetent with respect to actions between foreigners, but many exceptions have been established. See note by A. Pillet to App. Paris, Dec. 5, 1890 (S. 1892, 2, 233). With respect to municipal jurisdiction, see *Germany*, sections 12–40, Code Civ. Proc. *France*, articles 14, 15, Civ. Code.; article 59, Code Civ. Proc. *Italy*, articles 90–97, 105–107, Code Civ. Proc. Under article 105, subd. 3, jurisdiction is sometimes taken by way of retorsion. Cass. Turin, Aug. 22, 1873 (Annali 1873, 1, 432); App. Casale, April 10, 1891 (La Legge 1892, 1, 166).

△ plead judgment vs. ▽'s assignor, the mining Co. Then the ▽ replies that the △ never got jurisdiction of ▽ in Mich ... is null here.

ST. CLAIR v. COX.

(Supreme Court of the United States, 1882. 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222.)

Error to the Circuit Court of the United States for the Eastern District of Michigan.

FIELD, J. This action was brought by the plaintiff in the court below to recover the amount due on two promissory notes of the defendants, each for the sum of $2,500, bearing date on the second of August, 1877, and payable five months after date, to the order of the Winthrop Mining Company, at the German National Bank, in Chicago, with interest at the rate of 7 per cent. per annum. To the action the defendants set up various defenses, and, among others, substantially these: That the consideration of the notes had failed; that they were given with two others of like tenor and amount to the Winthrop Mining Company, a corporation created under the laws of Illinois, in part payment for ore and other property sold to the defendants upon a representation as to its quantity, which proved to be incorrect; that only a portion of the quantity sold was ever delivered, and that the value of the deficiency exceeded the amount of the notes in suit; that at the commencement of the action, and before the transfer of the notes to the plaintiff, the Winthrop Mining Company was indebted to the defendants in a large sum, viz., $10,000, upon a judgment recovered by them in the circuit court of Marquette county, in the state of Michigan, and that the notes were transferred to him after their maturity and dishonor, and after he had notice of the defenses to them. On the trial, evidence was given by the defendants tending to show that the plaintiff was not a bona fide holder of the notes for value. A certified copy of that judgment was also produced by them and offered in evidence, but on his objection that it had not been shown that the court had obtained jurisdiction of the parties, it was excluded, and to the exclusion an exception was taken. The jury found for him for the full amount claimed, and judgment having been entered thereon, the defendants brought the case here for review. The ruling of the court below in excluding the record constitutes the only error assigned.

The judgment of the circuit court in Michigan was rendered in an action commenced by attachment. If the plaintiffs in that action were, at its commencement, residents of the state, of which some doubt is expressed by counsel, the jurisdiction of the court, under the writ, to dispose of the property attached cannot be doubted, so far as was necessary to satisfy their demand. No question was raised as to the validity of the judgment to that extent. The objection to it was as evidence that the amount rendered was an existing obligation or debt against the company. If the court had not acquired jurisdiction over the company, the judgment established nothing as to its liability, beyond the amount which the proceeds of the property discharged.

There was no appearance of the company in the action, and judgment against it was rendered for $6,450 by default. The officer, to whom the writ of attachment was issued, returned that, by virtue of it, he had seized and attached certain specified personal property of the defendant, and had also served a copy of the writ, with a copy of the inventory of the property attached, on the defendant, "by delivering the same to Henry J. Colwell, Esq., agent of the said Winthrop Mining Company, personally, in said county."

The laws of Michigan provide for attaching property of absconding, fraudulent, and nonresident debtors and of foreign corporations. They require that the writ issued to the sheriff, or other officer by whom it is to be served, shall direct him to attach the property of the defendant, and to summon him if he be found within the county, and also to serve on him a copy of the attachment and of the inventory of the property attached. They also declare that where a copy of the writ of attachment has been personally served on the defendant the same proceedings may be had thereon in the suit in all respects as upon the return of an original writ of summons personally served where suit is commenced by such summons. 2 Comp. Laws 1871, §§ 6397, 6413. They also provide, in the chapter regulating proceedings by and against corporations, that "suits against corporations may be commenced by original writ of summons, or by declaration, in the same manner that personal actions may be commenced against individuals, and such writ, or a copy of such declaration, in any suit against a corporation, may be served on the presiding officer, the cashier, the secretary, or the treasurer thereof; or, if there be no such officer, or none can be found, such service may be made on such other officer or member of such corporation, or in such other manner as the court in which such suit is brought may direct;" and that "in suits commenced by attachment in favor of a resident of this state against any corporation created by or under the laws of any other state, government, or country, if a copy of such attachment, and of the inventory of property attached, shall have been personally served on any officer, member, clerk, or agent of such corporation within this state, the same proceedings shall be thereupon had, and with like effect, as in case of an attachment against a natural person, which shall have been returned served in like manner upon the defendant." 2 Comp. Laws 1871, §§ 6544, 6550.

The courts of the United States only regard judgments of the state courts establishing personal demands as having validity or as importing verity where they have been rendered upon personal citation of the party, or, what is the same thing, of those empowered to receive process for him, or upon his voluntary appearance.

In Pennoyer v. Neff we had occasion to consider at length the manner in which state courts can acquire jurisdiction to render a personal judgment against nonresidents which would be received as evidence in the federal courts; and we held that personal service of cita-

tion on the party or his voluntary appearance was, with some exceptions, essential to the jurisdiction of the court. The exceptions related to those cases where proceedings are taken in a state to determine the status of one of its citizens towards a nonresident, or where a party has agreed to accept a notification to others or service on them as citation to himself. 95 U. S. 714, 24 L. Ed. 565. The doctrine of that case applies, in all its force, to personal judgments of state courts against foreign corporations. The courts rendering them must have acquired jurisdiction over the party by personal service or voluntary appearance, whether the party be a corporation or a natural person. There is only this difference: A corporation, being an artificial being, can act only through agents, and only through them can be reached, and process must, therefore, be served upon them. In the state where a corporation is formed it is not difficult to ascertain who are authorized to represent and act for it. Its charter or the statutes of the state will indicate in whose hands the control and management of its affairs are placed. Directors are readily found, as also the officers appointed by them to manage its business. But the moment the boundary of the state is passed difficulties arise; it is not so easy to determine who represent the corporation there and under what circumstances service on them will bind it. Formerly it was held that a foreign corporation could not be sued in an action for the recovery of a personal demand outside of the state by which it was chartered. The principle that a corporation must dwell in the place of its creation, and cannot, as said by Chief Justice Taney, migrate to another sovereignty, coupled with the doctrine that an officer of the corporation does not carry his functions with him when he leaves his state, prevented the maintenance of personal actions against it. There was no mode of compelling its appearance in the foreign jurisdiction. Legal proceedings there against it were, therefore, necessarily confined to the disposition of such property belonging to it as could be there found; and to authorize them legislation was necessary.

In McQueen v. Middleton Mfg. Co., decided in 1819, the Supreme Court of New York, in considering the question whether the law of that state authorized an attachment against the property of a foreign corporation, expressed the opinion that a foreign corporation could not be sued in the state, and gave as a reason that the process must be served on the head or principal officer within the jurisdiction of the sovereignty where the artificial body existed; observing that if the president of a bank went to New York from another state he would not represent the corporation there; and that "his functions and his character would not accompany him when he moved beyond the jurisdiction of the government under whose laws he derived this character." 16 Johns. (N. Y.) 6. The opinion thus expressed was not, perhaps, necessary to the decision of the case, but nevertheless it has been accepted as correctly stating the law. It was cited with approval by the Supreme Court of Massachusetts, in 1834, in Peckham v. North Parish

in Haverhill, the court adding that all foreign corporations were without the jurisdiction of the process of the courts of the commonwealth. 16 Pick. (Mass.) 274. Similar expressions of opinion are found in numerous decisions, accompanied sometimes with suggestions that the doctrine might be otherwise if the foreign corporation sent its officer to reside in the state and transact business there on its account. Libbey v. Hodgdon, 9 N. H. 394; Moulin v. Trenton Mut. Life & Fire Ins. Co., 24 N. J. Law, 222.

This doctrine of the exemption of a corporation from suit in a state other than that of its creation, was the cause of much inconvenience and often of manifest injustice. The great increase in the number of corporations of late years, and the immense extent of their business, only made this inconvenience and injustice more frequent and marked. Corporations now enter into all the industries of the country. The business of banking, mining, manufacturing, transportation, and insurance is almost entirely carried on by them, and a large portion of the wealth of the country is in their hands. Incorporated under the laws of one state, they carry on the most extensive operations in other states. To meet and obviate this inconvenience and injustice, the Legislatures of several states interposed and provided for service of process on officers and agents of foreign corporations doing business therein. While the theoretical and legal view, that the domicile of a corporation is only in the state where it is created, was admitted, it was perceived that when a foreign corporation sent its officers and agents into other states and opened offices, and carried on its business there, it was, in effect, as much represented by them there as in the state of its creation. As it was protected by the laws of those states, allowed to carry on its business within their borders, and to sue in their courts, it seemed only right that it should be held responsible in those courts to obligations and liabilities there incurred. All that there is in the legal residence of a corporation in the state of its creation consists in the fact that by its laws the corporators are associated together and allowed to exercise as a body certain functions, with a right of succession in its members. Its officers and agents constitute all that is visible of its existence; and they may be authorized to act for it without as well as within the state. There would seem, therefore, to be no sound reason why, to the extent of their agency, they should not be equally deemed to represent it in the states for which they are respectively appointed when it is called to legal responsibility for their transactions. The case is unlike that of suits against individuals. They can act by themselves, and upon them process can be directly served, but a corporation can only act and be reached through agents. Serving process on its agents in other states, for matters within the sphere of their agency, is, in effect, serving process on it as much so as if such agents resided in the state where it was created.

A corporation of one state cannot do business in another state without the latter's consent, express or implied, and that consent may be

accompanied with such conditions as it may think proper to impose. As said by this court in Lafayette Ins. Co. v. French, "these conditions must be deemed valid and effectual by other states and by this court, provided they are not repugnant to the Constitution or laws of the United States or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense." 18 How. 404, 407, 15 L. Ed. 451; Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357.

The state may, therefore, impose as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that in any litigation arising out of its transactions in the state, it will accept as sufficient the service of process on its agents or persons specially designated, and the condition would be eminently fit and just. And such condition and stipulation may be implied as well as expressed. If a state permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it for business there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the state are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of the process. Such condition must not, however, encroach upon that principle of natural justice which requires notice of a suit to a party before he can be bound by it. It must be reasonable; and the service provided for should be only upon such agents as may be properly deemed representatives of the foreign corporation. The decision of this court in Lafayette Ins. Co. v. French, to which we have already referred, sustains these views.

The state of Michigan permits foreign corporations to transact business within her limits. Either by express enactment, as in the case of insurance companies, or by her acquiescence, they are as free to engage in all legitimate business as corporations of her own creation. Her statutes expressly provide for suits being brought by them in her courts, and for suits by attachment being brought against them in favor of residents of the state. And in these attachment suits they authorize the service of a copy of the writ of attachment, with a copy of the inventory of the property attached, on "any officer, member, clerk, or agent of such corporation," within the state, and give to a personal service of a copy of the writ and of the inventory on one of these persons the force and effect of personal service of a summons on a defendant in suits commenced by summons.

It thus seems that a writ of foreign attachment in that state is made to serve a double purpose—as a command to the officer to attach property of the corporation and as a summons to the latter to appear in the suit. We do not, however, understand the laws as authorizing the service of a copy of the writ, as a summons, upon an

agent of a foreign corporation unless the corporation be engaged in business in the state, and the agent be appointed to act there. We so construe the words "agent of such corporation within this state." They do not sanction service upon an officer or agent of the corporation who resides in another state, and is only casually in the state, and not charged with any business of the corporation there. The decision in Newell v. Great Western Ry. Co. of Canada, reported in 19 Mich. 336, supports this view, although that was the case of an attempted service of a declaration as the commencement of the suit. The defendant was a Canadian corporation owning and operating a railroad from Suspension Bridge in Canada to the Detroit line at Windsor, opposite Detroit, and carrying passengers in connection with the Michigan Central Railroad Company, upon tickets sold by such companies respectively. The suit was commenced in Michigan, the declaration alleging a contract by the defendant to carry the plaintiff over its road, and its violation of the contract by removing him from its cars at an intermediate station. The declaration was served upon Joseph Price, the treasurer of the corporation, who was only casually in the state. The corporation appeared specially to object to the jurisdiction of the court, and pleaded that it was a foreign corporation, and had no place of business or agent or officer in the state, or attorney to receive service of legal process, or to appear for it; and that Joseph Price was not in the state at the time of service on him on any official business of the corporation. The plaintiff having demurred to this plea the court held the service insufficient.

"The corporate entity," said the court, "could by no possibility enter the state, and it could do nothing more in that direction than to cause itself to be represented here by its officers or agents. Such representation would, however, necessarily imply something more than the mere presence here of a person possessing, when in Canada, the relation to the company of an officer or agent. To involve the representation of the company here, the supposed representative would have to hold or enjoy in this state an actual present official or representative status. He would be required to be here as an agent or officer of the corporation, and not as an isolated individual. If he should drop the official or representative character at the frontier, if he should bring that character no further than the territorial boundary of the government to whose laws the corporate body itself, and consequently the official positions of its officers also, would be constantly indebted for existence, it could not, with propriety, be maintained that he continued to possess such character by force of our statute. Admitting, therefore, for the purpose of this suit, that in given cases the foreign corporation would be bound by service on its treasurer in Michigan, this could only be so when the treasurer, the then official, the officer then in a manner impersonating the company, should be served. Joseph Price was not here as the treasurer of the defendants. He did not then represent them. His act in coming was not the act of the company, nor was his remain-

ing the business or act of any besides himself. He had no principal and he was not an agent. He had no official status or representative character in this state." Page 344.

According to the view thus expressed by the Supreme Court of Michigan service upon an agent of a foreign corporation will not be deemed sufficient unless he represents the corporation in the state. This representation implies that the corporation does business, or has business in the state for the transaction of which it sends or appoints an agent there. If the agent occupies no representative character with respect to the business of the corporation in the state, a judgment rendered upon service on him would hardly be considered in other tribunals as possessing any probative force. In a case where similar service was made in New York upon an officer of a corporation of New Jersey accidentally in the former state, the Supreme Court of New Jersey said that a law of another state which sanctioned such service upon an officer accidentally within its jurisdiction was "so contrary to natural justice and to the principles of international law that the courts of other states ought not to sanction it." Moulin v. Trenton Mut. Life & Fire Ins. Co., 24 N. J. Law, 222, 234.

Without considering whether authorizing service of a copy of a writ of attachment as a summons on some of the persons named in the statute—a member, for instance, of the foreign corporation, that is, a mere stockholder—is not a departure from the principle of natural justice mentioned in Lafayette Ins. Co. v. French, which forbids condemnation without citation, it is sufficient to observe that we are of opinion that when service is made within the state upon an agent of a foreign corporation it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record—either in the application for the writ or accompanying its service, or in the pleadings or the finding of the court—that the corporation was engaged in business in the state. The transaction of business by the corporation in the state, general or special, appearing, a certificate of service by the proper officer on a person who is its agent there would, in our opinion, be sufficient prima facie evidence that the agent represented the company in the business. It would then be open, when the record is offered as evidence in another state, to show that the agent stood in no representative character to the company, that his duties were limited to those of a subordinate employé, or to a particular transaction, or that his agency had ceased when the matter in suit arose.

In the record, a copy of which was offered in evidence in this case, there was nothing to show, so far as we can see, that the Winthrop Mining Company was engaged in business in the state when service was made on Colwell. The return of the officer, on which alone reliance was placed to sustain the jurisdiction of the state court, gave no information on the subject. It did not, therefore, appear even prima facie that Colwell stood in any such representative character

to the company as would justify the service of a copy of the writ on him. The certificate of the sheriff, in the absence of this fact in the record, was insufficient to give the court jurisdiction to render a personal judgment against the foreign corporation. The record was, therefore, properly excluded.

Judgment affirmed.[23]

OLD WAYNE MUT. LIFE ASS'N OF INDIANAPOLIS v. McDONOUGH.

(Supreme Court of the United States, 1907. 204 U. S. 8, 27 Sup. Ct. 236, 51 L. Ed. 345.)

The Old Wayne Mutual Life Association of Indianapolis, incorporated under the law of the state of Indiana, issued in that state a policy of insurance upon the life of Patrick McNally, who, as well as the beneficiaries, was a citizen of the state of Pennsylvania. The company did some business in Pennsylvania which had no relation, however, to this contract, but did not comply with the following statute of the state of Pennsylvania: "No insurance company not of this state, nor its agents, shall do business in this state until it has filed with the insurance commissioner of this state a written stipulation, duly authenticated by the company, agreeing that any legal process affecting the company, served on the insurance commissioner, or the party designated by him, or the agent specified by the company to receive service of process for said company, shall have the same effect as if served personally on the company within this state, and if such company should cease to maintain such agent in this state so designated such process may thereafter be served on the insurance commissioner."

Suit was brought against the company in the court of common pleas of Susquehanna county, Pa., upon this contract of insurance, the summons being served on the commissioner of insurance alone. No notice of the summons appears to have been given by the commissioner to the defendant; nor did the defendant appear in the action. Judgment was rendered by default against the life association. The present suit is brought in Indiana upon that judgment.[24]

HARLAN, J.[25] * * * But even if it be assumed that the insurance company was engaged in some business in Pennsylvania at the time the contract in question was made, it cannot be held that the company

[23] It has been held that the ground of jurisdiction is not implied submission, but that a foreign corporation transacting business within a state is "found" there. Wilson Packing Co. v. Hunter, Fed. Cas. No. 17,852 (1879). In England a foreign corporation is regarded as a resident if it carries on business in England, however short the period. La Compagnie Générale Transatlantique v. Law, [1899] A. C. 431; Dunlop Pneumatic Tyre Co. v. Actiengesellschaft, [1902] 1 K. B. (C. A.) 342.

[24] The statement of facts has been abstracted from the opinion.

[25] A part of the opinion has been omitted.

agreed that service of process upon the insurance commissioner of that commonwealth would alone be sufficient to bring it into court in respect of all business transacted by it, no matter where, with, or for the benefit of, citizens of Pennsylvania. Undoubtedly, it was competent for Pennsylvania to declare that no insurance corporation should transact business within its limits without filing the written stipulation specified in its statute. Lafayette Ins. Co. v. French, 18 How. 404, 15 L. Ed. 451; Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357; Hooper v. California, 155 U. S. 648, 653, 15 Sup. Ct. 207, 39 L. Ed. 297, 300, 5 Inters. Com. Rep. 610, and authorities cited; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 45, 20 Sup. Ct. 518, 44 L. Ed. 657, 664. It is equally true that, if an insurance corporation of another state transacts business in Pennsylvania without complying with its provisions, it will be deemed to have assented to any valid terms prescribed by that commonwealth as a condition of its right to do business there; and it will be estopped to say that it had not done what it should have done in order that it might lawfully enter that commonwealth and there exert its corporate powers. In Baltimore & O. R. Co. v. Harris, 12 Wall. 65, 81, 20 L. Ed. 354, the question was as to the jurisdiction of the Supreme Court of the District of Columbia of a suit against a corporation in Maryland, whose railroad entered the District with the consent of Congress. This court said: "It [the corporation] cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there. If it does business there it will be presumed to have assented, and will be bound accordingly." This language was cited and approved in Chicago & N. W. R. Co. v. Whitton, 13 Wall. 270, 285, 20 L. Ed. 571, 576. The same question was before the court in Ex parte Schollenberger, 96 U. S. 369, 376, 24 L. Ed. 853, 854, and the principle announced in the Harris and Whitton Cases was approved. In the Schollenberger Case the Pennsylvania statute here in question was involved. To the same effect are the following cases: Ehrman v. Teutonia Ins. Co. (D. C.) 1 Fed. 471, 1 McCrary, 123, 129; Knapp, Stout & Co. v. National Mut. Fire Ins. Co. (C. C.) 30 Fed. 607; Berry v. Knights Templars' & Masons' Life Indemnity Co. (C. C.) 46 Fed. 439, 441, 442; Diamond Plate Glass Co. v. Minneapolis Mut. Fire Ins. Co. (C. C.) 55 Fed. 27; Stewart v. Harmon (C. C.) 98 Fed. 190, 192.

Conceding, then, that by going into Pennsylvania, without first complying with its statute, the defendant association may be held to have assented to the service upon the insurance commissioner of process in a suit brought against it there in respect of business transacted by it in that commonwealth, such assent cannot properly be implied where it affirmatively appears, as it does here, that the business was not transacted in Pennsylvania. Indeed, the Pennsylvania statute, upon its face, is only directed against insurance companies who do business in that commonwealth—"in this state." While the highest considerations of

public policy demand that an insurance corporation, entering a state in defiance of a statute which lawfully prescribes the terms upon which it may exert its powers there, should be held to have assented to such terms as to business there transacted by it, it would be going very far to imply, and we do not imply, such assent as to business transacted in another state, although citizens of the former state may be interested in such business.

As the suit in the Pennsylvania court was upon a contract executed in Indiana; as the personal judgment in that court against the Indiana corporation was only upon notice to the insurance commissioner, without any legal notice to the defendant association, and without its having appeared in person or by attorney or by agent in the suit; and as the act of the Pennsylvania court in rendering the judgment must be deemed that of the state within the meaning of the fourteenth amendment [Ex parte Virginia, 100 U. S. 339, 346, 347, 25 L. Ed. 676–680 (1880); Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567 (1881); Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220 (1885); Gibson v. Mississippi, 162 U. S. 565, 16 Sup. Ct. 904, 40 L. Ed. 1075 (1896); Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 233, 234, 17 Sup. Ct. 581, 41 L. Ed. 979 (1897)]—we hold that the judgment in Pennsylvania was not entitled to the faith and credit which, by the Constitution, is required to be given to the public acts, records, and judicial proceedings of the several states, and was void as wanting in due process of law.

The judgment of the Supreme Court of Indiana must, therefore, be reversed, with directions for further proceedings not inconsistent with this opinion.

It is so ordered.[27]

[27] With respect to jurisdiction over foreign corporations, see, in general, 85 Am. St. Rep. 905–938; 50 L. R. A. 589–597; 19 Cyc. 1338–1344. As to jurisdiction over suits between nonresidents and foreign corporations, see 70 L. R. A. 513–544. See, also, 21 Harv. Law Rev. 453, and W. A. C. Coutts, The Constitutionality of Statutes Authorizing Subservice of Process upon Corporations, 66 Central Law Journal, 109–124.

In New York service upon a foreign corporation which has not transacted business within the local jurisdiction has been held valid within the state. Pope v. Terre Haute Car & Mfg. Co., 87 N. Y. 137 (1881). Compare Grant v. Cananea Consol. Copper Co., 189 N. Y. 241, 82 N. E. 191 (1907). But such service will not be sufficient upon the removal of the cause to the federal courts. Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517 (1895). Nor will service upon a foreign corporation be sufficient after it has ceased to do business within the jurisdiction. Conley v. Mathieson Alkali Works, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113 (1903); Swann v. Mutual Reserve Fund Life Ass'n (C. C.) 100 Fed. 922 (1900). It has been sustained, however, as to causes of action arising within the state while the foreign corporation was doing business within such state. Ben Franklin Ins. Co. v. Gillett, 54 Md. 212 (1880); Collier v. Mutual Reserve Fund Life Ass'n (C. C.) 119 Fed. 617 (1902). The mere possession of property does not confer jurisdiction over the foreign corporation upon a personal cause of action. Territory of New Mexico v. Baker, 196 U. S. 432, 25 Sup. Ct. 375, 49 L. Ed. 540 (1905).

As to what constitutes "doing business," see Pennsylvania Lumbermen's Mut. Fire Ins. Co. v. Meyer, 197 U. S. 407, 25 Sup. Ct. 483, 49 L. Ed. 810

CHRISTMAS v. RUSSELL.

(Supreme Court of the United States, 1866. 5 Wall. 290, 18 L. Ed. 475.)

CLIFFORD, J.[28] Wilson, on the 11th day of November, 1857, recovered judgment in one of the county courts in the state of Kentucky, against the plaintiff in error, for the sum of five thousand six hundred and thirty-four dollars and thirteen cents, which, on the 31st day of March, 1859, was affirmed in the Court of Appeals. Present record shows that the action in that case was assumpsit, and that it was founded upon a certain promissory note, signed by the defendant in that suit, and dated at Vicksburg, in the state of Mississippi, on the 10th day of March, 1840, and that it was payable at the Merchants' Bank, in New Orleans, and was duly indorsed to the plaintiff by the payee. Process was duly served upon the defendant, and he appeared in the case and pleaded to the declaration. Several defences were set up, but they were all finally overruled, and the verdict and judgment were for the plaintiff.

On the 4th day of June, 1854, the prevailing party in that suit instituted the present suit in the court below, which was an action of debt on that judgment, as appears by the transcript. Defendant was duly served with process, and appeared and filed six pleas in answer to the action. Reference, however, need only be particularly made to the second and fourth, as they embody the material questions presented for decision. Substance and effect of the second plea were that the note, at the commencement of the suit in Kentucky, was barred by the statute of limitations of Mississippi, the defendant having been a domiciled citizen of that state when the cause of action accrued, and from that time to the commencement of the suit.

Fourth plea alleges that the judgment mentioned in the declaration was procured by the fraud of the plaintiff in that suit. Plaintiff demurred to these pleas, as well as to the fifth and sixth, and the court sustained the demurrers. * * *

4. Cases may be found in which it is held that the judgment of a state court, when introduced as evidence in the tribunals of another state, are to be regarded in all respects as domestic judgments. On the other hand, another class of cases might be cited in which it is held that such judgments in the courts of another state are foreign judgments, and that as such the judgment is open to every inquiry to which other foreign judgments may be subjected under the rules of the common law. Neither class of these decisions is quite correct. They certainly are not foreign judgments under the Constitution (article

(1905); Peterson v. Chicago, R. I. & P. R. Co., 205 U. S. 364, 27 Sup. Ct. 513, 51 L. Ed. 841 (1907); A. Booth & Co. v. Weigand, 30 Utah, 135, 83 Pac. 734, 10 L. R. A. (N. S.) 693 (1906); W. H. Lutes Co. v. Wysong, 100 Minn. 112, 110 N. W. 367 (1907). But compare John Deere Plough Co. v. Wyland, 69 Kan. 255, 76 Pac. 863 (1904).

[28] Only so much of the opinion is given as relates to the defense of fraud.

4, § 1) and laws of Congress (Act May 26, 1790, c. 11, 1 Stat. 122) in any proper sense, because they "shall have such faith and credit given to them in every other court within the United States as they have by law or usage in the courts of the state from whence" they were taken, nor are they domestic judgments in every sense, because they are not the proper foundation of final process, except in the state where they were rendered. Besides, they are open to inquiry as to the jurisdiction of the court and notice to the defendant; but in all other respects they have the same faith and credit as domestic judgments. D'Arcy v. Ketchum, 11 How. 165, 13 L. Ed. 648; Webster v. Reid, 11 How. 437, 13 L. Ed. 761.

Subject to those qualifications, the judgment of a state court is conclusive in the courts of all the other states wherever the same matter is brought in controversy. Established rule is, that so long as the judgment remains in force it is of itself conclusive of the right of the plaintiff to the thing adjudged in his favor, and gives him a right to process, mesne or final, as the case may be, to execute the judgment. Voorhees v. Jackson, 10 Pet. 449, 9 L. Ed. 490; Huff v. Hutchinson, 14 How. 588, 14 L. Ed. 553.

5. Exactly the same point was decided in the case of Benton v. Burgot, 10 Serg. & R. (Pa.) 240, which, in all respects, was substantially like the present case. The action was debt on judgment recovered in a court of another state, and the defendant appeared and pleaded nil debet, and that the judgment was obtained by fraud, imposition, and mistake, and without consideration. Plaintiff demurred to those pleas, and the court of original jurisdiction gave judgment for the defendant. Whereupon the plaintiff brought error, and the Supreme Court of the state, after full argument, reversed the judgment and directed judgment for the plaintiff. Domestic judgments, say the Supreme Court of Maine, even if fraudulently obtained, must nevertheless be considered as conclusive until reversed or set aside. Granger v. Clark, 22 Me. 130. Settled rule, also, in the Supreme Court of Ohio, is that the judgment of another state, rendered in a case in which the court had jurisdiction, has all the force in that state of a domestic judgment, and that the plea of fraud is not available as an answer to an action on the judgment. Express decision of the court is, that such a judgment can only be impeached by a direct proceeding in chancery. Anderson v. Anderson, 8 Ohio, 108.

Similar decisions have been made in the Supreme Court of Massachusetts, and it is there held that a party to a judgment cannot be permitted in equity, any more than at law, collaterally to impeach it on the ground of mistake or fraud, when it is offered in evidence against him in support of the title which was in issue in the cause in which it was recovered. Boston & W. R. Corp. v. Sparhawk, 1 Allen (Mass.) 448, 79 Am. Dec. 750; Homer v. Fish, 1 Pick. (Mass.) 435, 11 Am. Dec. 218. Whole current of decisions upon the subject in that state seems to recognize the principle that when a cause of action

has been instituted in a proper forum, where all matters of defence were open to the party sued, the judgment is conclusive until reversed by a superior court having jurisdiction of the cause, or until the same is set aside by a direct proceeding in chancery. McRae v. Mattoon, 13 Pick. (Mass.) 57. State judgments, in courts of competent jurisdiction, are also held by the Supreme Court of Vermont to be conclusive as between the parties until the same are reversed or in some manner set aside and annulled. Strangers, say the court, may show that they were collusive or fraudulent; but they bind parties and privies. Atkinson v. Allen, 12 Vt. 624, 36 Am. Dec. 361. Redfield, C. J., said, in the case of Hammond v. Wilder, 25 Vt. 346, that there was no case in which the judgment of a court of record of general jurisdiction had been held void, unless for a defect of jurisdiction. Less uniformity exists in the reported decisions upon the subject in the courts of New York, but all those of recent date are to the same effect. Take, for example, the case of Embury v. Conner, 3 N. Y. 522, 53 Am. Dec. 325, and it is clear that the same doctrine is acknowledged and enforced. Indeed, the court, in effect, say that the rule is undeniable that the judgment or decree of a court possessing competent jurisdiction is final, not only as to the subject thereby determined, but as to every other matter which the parties might have litigated in the cause, and which they might have had decided. Dobson v. Pearce, 12 N. Y. 156, 62 Am. Dec. 152. Same rule prevails in the courts of New Hampshire, Rhode Island, and Connecticut, and in most of the other states. Hollister v. Abbott, 11 Foster (N. H.) 448, 64 Am. Dec. 342; Rathbone v. Terry, 1 R. I. 77; Topp v. Branch Bank of Alabama, 2 Swan (Tenn.) 188; Wall v. Wall, 28 Miss. 413.

For these reasons our conclusion is, that the fourth plea of the defendant is bad upon general demurrer, and that there is no error in the record. The judgment of the Circuit Court is, therefore affirmed with costs.

WARRINGTON v. BALL.

(Circuit Court of Appeals, Third Circuit, 1898. 90 Fed. 464, 33 C. C. A. 609.)

This was an action by William E. Ball against Anna M. Warrington, a citizen of Pennsylvania, to enforce an alleged liability of defendant as a stockholder in a Kansas corporation. The circuit court held the affidavit of defense insufficient, and rendered judgment for plaintiff, from which defendant brings error.

BUTLER, District Judge. The suit is founded on a judgment obtained in Kansas, against the Kansas Saving Bank, chartered under the laws of that state, and located there. The Constitution of Kansas (article 12, § 2), provides that "dues from corporations shall be secured by individual liability of stockholders, to an additional amount equal to the stock owned by each stockholder," and a statute of the state

(Gen. St. 1889, par. 1192) provides (when a creditor has obtained judgment against the corporation) as follows:

"If execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged, and upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

Several defenses are set up one of which is that the judgment sued upon is fraudulent; the allegation being, substantially, that it was obtained by collusion between the plaintiff and the representatives of the bank; that the bank was not indebted to the plaintiff, the certificate of deposit on which he sued having been issued for money furnished to the cashier personally; and that the object of the collusion was to avoid a defense, enable the plaintiff to obtain judgment by default, and pursue the defendant and other stockholders. The Circuit Court entered judgment for the plaintiff—holding the affidavit of defense to be insufficient.

It is not necessary to examine the several defenses averred. If one of them is sufficient the judgment must be reversed, and the case sent back for trial. If questions shall thereafter exist respecting others, they may be considered in the light of the facts, ascertained by the trial. We think the judgment was erroneously entered. If the averment of fraud was confined to the certificate of deposit, as the learned judge of the Circuit Court seems to have believed, a different question would be presented. The right to sue is, in terms, based on the judgment against the corporation; and these terms having received a literal interpretation by the Supreme Court of Kansas, in Ball v. Reese, 58 Kan. 614, 50 Pac. 875, 62 Am. St. Rep. 638, we must follow it, and treat the judgment alone, as the foundation of the suit. The fraud averred, however, as we have seen, involves the judgment itself. That it constitutes a valid defense we cannot doubt. Fraud, generally, vitiates whatever it touches—whether a contract, a deed, or a record. It is unnecessary to consider questions presented by such a defense when set up to suits on foreign judgments, against the defendant therein. The only question before us arises under the clause of the Constitution of the United States which provides that "full faith and credit shall be given in each state to public acts, records, and judicial proceedings of every other state." This judgment must be given the same credit here that it is entitled to in Kansas. What credit is it entitled to there? In the ab-

sence of decision by the supreme court of that state, the question might possibly present difficulties. We do not doubt however that we would hold it liable to invalidation by proof of the fraud here averred. Any other view would render the statutory remedy against stockholders too inequitable to justify its enforcement outside the state. Indeed the courts of many of the states have declined to enforce it under any circumstances. See Cushing v. Perot, 175 Pa. 66, 34 Atl. 447, 34 L. R. A. 737, 52 Am. St. Rep. 835; Marshall v. Sherman, 148 N. Y. 9, 42 N. E. 419, 34 L. R. A. 757, 51 Am. St. Rep. 654; Fowler v. Lamson, 146 Ill. 472, 34 N. E. 932, 37 Am. St. Rep. 163; Tuttle v. National Bank of Republic, 161 Ill. 497, 44 N. E. 984, 34 L. R. A. 750. To bind one by a judgment to which he is not a party, as provided for by the statute, is barely tolerable. To bind him by such a judgment obtained by fraudulent collusion (as here averred) would be intolerable. We are saved the necessity, however, of considering the subject by the decision in Ball v Reese, supra. The credit to which such judgments are entitled in Kansas, was there directly involved; and while the court (contrary to its former declarations) held the judgment to be conclusive of all questions except fraud and want of jurisdiction, it as distinctly held that it may be impeached and avoided for these causes. The court is emphatic in so declaring; and places fraud and want of jurisdiction in the same category. This determination of the question is conclusive. There is no force in the contention that the impeachment cannot be made collaterally. The court in Ball v. Reese distinctly says it can, and cites the following language from 3 Thomp. Corp. p. 392, § 3: "Although stockholders cannot appear and contest the merits of the action against the corporation, 'yet when a judgment is rendered against the corporation it establishes as conclusively as any judgment can establish the matter in litigation, the liability of the corporation to pay the debt. Like any judgment, it may be impeached for fraud or for want of jurisdiction by a party entitled to question it; but it cannot be assailed collaterally by a stockholder for any other cause when sought to be charged in respect of it.'"

The defendant cannot indeed impeach the judgment in any other way than collaterally. She is not a party to it; and it is valid as between the plaintiff and the bank, so long as the latter acquiesces. She could not therefore be heard in an application to open it. A proceeding in equity to declare it void as to her, would be as clearly a collateral impeachment as that here proposed. The suggestion that she should go to Kansas to seek equitable aid, has no support in reason or authority. She might have such aid wherever the plaintiff is found. Having come here and sought the assistance of our courts to enforce the judgment, she might appeal to equity here against the consequences of the fraud, as effectually as she could in Kansas. She is not required however to seek the protection of equity anywhere. Fraud is an available defense at law, and she may therefore set it up in answer to the suit.

The judgment must be reversed.

LEVIN v. GLADSTEIN.

(Supreme Court of North Carolina, 1906. 142 N. C. 482, 55 S. E. 371, 115 Am. St. Rep. 747.)

This was a suit upon a judgment obtained in the superior court of Baltimore City, Md. Personal service was had upon defendant while in Baltimore. Action was instituted upon said judgment before a justice of the peace of Durham county, and from a judgment therein defendant appealed to the superior court. At the beginning of the trial in the superior court counsel for defendant stated he admitted the regularity of the judgment sued upon, and withdrew all pleas and defenses to said action, save and except that the judgment upon which the action was brought was procured by a fraud practiced by plaintiffs upon the defendant, and that he insisted upon that plea alone. Thereupon the plaintiffs moved for judgment for that the judgment rendered by the court of Maryland was not open to attack in this action for fraud. Motion overruled, and plaintiffs excepted. His honor held that the burden of proof was upon the defendant, and he proceeded to introduce testimony. Mr. Gladstein testified that he was the defendant in the case; that he knew Philip Levin and Simon Levin, and had bought goods of them; that some time prior to his going to Baltimore he bought a bill of goods of plaintiffs, but had shipped some of them back to Baltimore because they were not up to the sample; that plaintiffs had refused to take the goods out of the depot in Baltimore; that upon his visit to Baltimore, summons was served upon him in the action brought there by the plaintiffs, but after said summons was served upon him, and before the return day, he saw one of the plaintiffs and had an interview with him at the store of L. Singer & Son, during which interview plaintiffs agreed with him to withdraw said suit and return the goods to him at Durham, provided he would, upon their receipt, pay the plaintiffs a sum of money, which they agreed upon, to wit, $133, and freight and storage not to exceed $3; that relying upon this agreement he returned to Durham, and made no defense to the action; that plaintiffs never returned the goods to him at Durham; that the first time he knew of the judgment was when called upon by attorneys for plaintiffs to pay said judgment. There was testimony contradicting defendant. After hearing testimony from both parties, the court submitted the following issue to the jury: "Was the alleged judgment rendered for $143, bearing date April 27, 1904, in the superior court of Baltimore City, in favor of Philip Levin and Simon Levin, copartners, trading as P. Levin & Co., against M. Gladstein, obtained by the fraud of plaintiffs?" To which the jury responded "Yes." Judgment was thereupon rendered that the plaintiffs take nothing by their action, and that the defendant go without day, etc. Plaintiffs excepted and appealed.

CONNOR, J. Two questions are presented upon the plaintiffs' appeal:

First. Can the defendant, in the manner proposed herein, resist a recovery upon the judgment rendered against him by the Maryland court? Second. If so, has the justice of the peace jurisdiction to hear and determine such defense? The plaintiffs, relying upon the provision of the Constitution of the United States (article 4, § 1) that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state," earnestly contend that the defense is not open to the courts of this state; that the remedy for the fraud in procuring the judgment, if any, must be sought in the courts of Maryland. The well-considered brief of plaintiffs' counsel thus states the question involved in the appeal: "The case presents the question of the right of a defendant to avail himself of the plea of fraud as a defense to an action in one state based upon a judgment obtained in a sister state." When a judgment rendered by the court of one state becomes the cause of action in the court of another state, and the transcript, as made in such state, duly certified, as prescribed by the act of Congress, is produced, it imports verity, and can be attacked for only one purpose. The defendant may deny that the court had jurisdiction of his person or of the subject-matter, and for this purpose may attack the recitals in the record. Bailey on Jurisdiction, §§ 198, 199. Jurisdiction will be presumed until the contrary is shown. If not denied, or when established after denial, defendant cannot interpose the plea of nil debet. This was held in Mills v. Duryee, 7 Cranch (U. S.) 480, 3 L. Ed. 411, and has been uniformly followed by both state and federal courts. 2 Am. Lead. Cases, 538. In Christmas v. Russell, 72 U. S. 290, 18 L. Ed. 475, Mr. Justice Clifford said: "Substance of the second objection of the present defendant to the fourth plea is that, inasmuch as the judgment is conclusive between the parties in the state where it was rendered, it is equally so in every other court in the United States, and consequently that the plea of fraud in procuring the judgment is not a legal answer to the declaration. Principal question in the case of Mills v. Duryee was whether nil debet was a good plea to an action founded on a judgment of another state. Much consideration was given to the case, and the decision was that the record of a state court duly authenticated under the act of Congress must have in every other court of the United States such faith and credit as it had in the state court from whence it was taken, and that nil debet was not a good plea to such an action." The learned justice proceeds to say: "Domestic judgment, under the rules of the common law, could not be collaterally impeached or called in question if rendered in a court of competent jurisdiction. It could only be done directly by writ of error, petition for new trial or by bill in chancery." It will be found upon careful examination of Hanley v. Donoghue, 116 U. S. 1, 6 Sup. Ct. 242, 29 L. Ed. 535 (Id., 59 Md. 239, 43 Am. Rep. 554), that the question under consideration here was not involved. It is true that in the discussion Mr. Justice Gray uses the language cited by counsel which excludes the right of the defendant to impeach the judg-

ment "for fraud in obtaining it." So, in Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538, Chief Justice Fuller, after quoting the language of the Constitution, says: "This does not prevent an inquiry into the jurisdiction of the court in which judgment is rendered, to pronounce the judgment, nor into the right of the state to exercise authority over the parties or the subject-matter, nor whether the judgment is founded in and impeachable for a manifest fraud. The Constitution did not mean to confer any new power on the states, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their admitted territory." The learned Chief Justice relies upon the same line of cases cited by Judge Gray. Neither of them was discussing the question here presented, nor was it presented by the record in those cases. The case of Dobson v. Pearce, 12 N. Y. 156, 62 Am. Dec. 152, was cited in Cole v. Cunningham, and as we shall see later, was approved. In Maxwell v. Stewart, 89 U. S. 77, 22 L. Ed. 564, the court simply reiterated the doctrine announced in Mills v. Duryee, supra, that the plea of nil debet could not be interposed in an action upon a judgment. Bissell v. Briggs, 9 Mass. 462, 6 Am. Dec. 88; Bailey on Jurisdiction, 191–192. This court, in Miller v. Leach, 95 N. C. 229, by Ashe, J., said that the judgment of a sister state was put by the Constitution upon the same footing as domestic judgments precluding all inquiry into the merits of the subject-matter, "but leaving the questions of jurisdiction, fraud in the procurement, and whether the parties were properly before the court, open to objection"—citing Mills v. Duryee, supra. See, also, Coleman v. Howell, 131 N. C. 125, 42 S. E. 555. It is elementary learning that this plea was not proper in actions founded upon a specialty or a record. Shipman, Com. Law Pl. 196. But, if plaintiff, in an action on a record, instead of demurring to the plea, accepts it and joins issue, the defendant is at liberty to prove any and every special matter of defense which might be proved under the same plea in debt. For the plaintiff, by accepting the plea, founds his demand solely upon the defendant being indebted and thus waives the estoppel, or conclusive evidence of the fact, etc. Overman v. Clemmons, 19 N. C. 185; Gould's Pl. 287. Hence we find that in all of the cases in which the plea of nil debet was entered, the defendant demurred, and the decision was on the demurrer, which was uniformly sustained. Mills v. Duryee, supra; Maxwell v. Stewart, supra; Benton v. Burgot, 10 Serg. & R. (Pa.) 240; Carter v. Wilson, 18 N. C. 362; Knight v. Wall, 19 N. C. 125. In Allison v. Chapman (C. C.) 19 Fed. 488, Nixon, J., says: "The subject is fully discussed * * * and the conclusion is reached that the allegation in a plea that a judgment was procured through fraud is not a good common-law defense to a suit brought upon it in the same or a sister state." This conclusion is fully supported by all of the authorities, and in this we concur with the learned counsel for the plaintiff. Notwithstanding the well-settled rule that the judgment, when sued upon in another state, cannot be impeach-

ed or attacked for fraud by any plea known to the common-law system of pleading, it is equally clear that upon sufficient allegation and proof defendant is entitled, in a court of equity, to enjoin the plaintiff from suing upon or enforcing his judgment.

[The learned justice here recited extracts from Pearce v. Olney, 20 Conn. 544, Davis v. Headley, 22 N. J. Eq. 123, and Payne v. O'Shea, 84 Mo. 129.]

Nor does the constitutional provision stand in the way of such proceeding. Usually, the power of a court of equity to interfere in the enforcement of judgments obtained by fraud, is invoked to restrain the plaintiff, in such judgments, from issuing or enforcing execution. The theory was, as we have seen, that the court of equity did not call into question the integrity of the judgment, but by its decree operated in personam upon the plaintiff, enforcing the decree by punishing for contempt disobedience to it. But when the judgment, as in Pearce v. Olney, supra, was made the cause of action at law, equity enjoined the plaintiff, shown to be guilty of the fraud, from prosecuting the action. Our equity reports contain many illustrations of the practice. Hadley v. Rountree, 59 N. C. 107. The underlying principle is that the judgment of a sister state will be given the same faith and credit which is given domestic judgments.

It is contended, however, and with force, that the "faith and credit" to be given such judgment is measured by the law of the state in which it is rendered. We find, upon examining the decisions made by the Maryland court, that in that state a court of equity will enjoin the enforcement of a judgment obtained by fraud. We had no doubt that such was the law in that state.

[The learned justice here recited extracts from Little v. Price, 1 Md. Ch. 182, and Wagner v. Shank, 59 Md. 313.]

It is thus apparent that the judgment obtained by the fraud of plaintiffs, as found by the jury, would be open to attack in the courts of Maryland upon the universally accepted principles of equity jurisprudence invoked in the courts of this state, and in giving the defendant relief we are giving the judgment the same "faith and credit" which it has in that state. Mr. Bailey, in his work on Jurisdiction, 202, 203, notes the language of Judge Gray in Christmas v. Russell, supra, and Fuller, C. J., in Cole v. Cunningham, supra, saying: "However it should be conceded that whatever may have been the rule in the court prior to the decision in Cole v. Cunningham, that the rule there stated must be taken as the present doctrine of that court." He notes the diversity in the several states saying that in Maryland the court has not followed the rule in Cunningham's Case, citing Hambleton v. Glenn, 72 Md. 351, 20 Atl. 121. In that case the question was whether in that state the judgment rendered in Virginia could be collaterally attacked for fraud. That is not the question here, but whether in Maryland the judgment of its own courts could be enjoined in equity for fraud, and, as we have seen, it may be. We are not seeking to know what the

courts of Maryland would permit to be done if a North Carolina judgment was sued upon there, but what they will permit to be done when one of their own judgments is sued upon and attacked for fraud. The plaintiff says, however this may be, the defendant can have this relief only in Maryland; that he must go into that state, and attack the judgment or enjoin the plaintiff. Mr. Freeman says: "If the judgment was procured under circumstances requiring its enforcement to be enjoined in equity, the question will arise whether these circumstances may be interposed as a defense to an action on the judgment in another state. Notwithstanding expressions to the contrary, we apprehend that, in bringing an action in another state, the judgment creditor must submit to the law of the forum, and must meet the charge of fraud in its procurement, when presented in any form in which fraud might be urged in an action on a domestic judgment. If, in the state in which the action is pending, fraud can be pleaded to an action on a domestic judgment, it is equally available and equally efficient in actions on judgments of other states. * * * It is true that two of the decisions of the Supreme Court of the United States contain the general statement that the plea of fraud is not available as an answer to an action on a judgment—citing Christmas v. Russell and Maxwell v. Stewart, supra. We apprehend, however, that these decisions are inapplicable in those states in which the distinction between law and equity is attempted to be abolished, and equitable as well as legal defenses are, when properly pleaded, admissible in actions at law." Freeman on Judgments, § 576. If those states in which equitable remedies were administered only by courts of equity enjoined proceeding at law upon a judgment obtained by fraud, why should not, in those courts administering legal and equitable rights and remedies in one court and one form of action, the defendant be permitted to set up his equitable defense to the action on the judgment? The question is answered by the case of Gray v. Richmond Bicycle Co., 167 N. Y. 348, 60 N. E. 663, 82 Am. St. Rep. 720. The action was brought on a note which the court held was merged into a judgment rendered in Indiana. It was alleged that the judgment was procured by fraud. Vann, J., said that it was admitted that "even a foreign judgment may be successfully assailed for fraud in its procurement. * * * It was not necessary to go into the state of Indiana to obtain relief from the judgment through its courts, for, as we have held, a court from one state may, when it has jurisdiction of the parties, determine the question whether a judgment between them, rendered in another state, was obtained by fraud, and, if so, may enjoin the enforcement of it, although its subject-matter is situated in such other state. The assertion of the foreign judgment as a bar in this action was an attempt to enforce it indirectly and it was the duty of the trial court to send the case to the jury with the instruction that, if they found the judgment was procured by fraud, it could not be asserted as a bar in this state." Davis v. Cornue, 151 N. Y. 172, 179, 45 N. E. 449. The same rule is laid down by Black.

In some of the states, when the formal distinction between law and equity is abrogated, the law allows equitable defenses to be set up in an action at law. Hence, in those states, when the suit is brought upon a domestic judgment, the defendant is allowed to plead any circumstances of fraud which would have justified a court of equity in interfering in his behalf. Now, when the same judgment is made the basis of an action of another state, he ought to be allowed the same latitude of defense; for if it were otherwise, the foreign court would be required to give greater faith and credit to the judgment than it is entitled to at home, which the Constitution does not require. Black on Judgments, § 918. That the defense made by defendant may, under our Code, be set up by way of answer, is well settled. The cases in point are collected in Clark's Code (3d Ed.) p. 238. * * *[29]

We find no error in the ruling of his honor in regard to the burden of proof or probative force of the testimony required to establish the defense. We have examined the authorities cited by plaintiffs' counsel, and while there is, to say the least, some apparent conflict, we are of the opinion that the conclusion reached by us is in accordance with the weight of authority and those best sustained by reason.

There is no error.[30]

FAUNTLEROY v. LUM.

(Supreme Court of the United States, 1908. 210 U. S. 230, 28 Sup. Ct. 641, 52 L. Ed. 1039.)

HOLMES, J. This is an action upon a Missouri judgment, brought in a court of Mississippi. The declaration set forth the record of the judgment. The defendant pleaded that the original cause of action arose in Mississippi out of a gambling transaction in cotton futures; that he declined to pay the loss; that the controversy was submitted to arbitration, the question as to the illegality of the transaction, however, not being included in the submission; that an award was rendered against the defendant; that thereafter, finding the defendant temporarily in Missouri, the plaintiff brought suit there upon the award; that the trial court refused to allow the defendant to show the nature of the transaction, and that, by the laws of Mississippi, the same was illegal and void, but directed a verdict if the jury should find that the submission and award were made, and remained unpaid; and that a verdict was rendered and the judgment in suit entered upon the same. (The plaintiff in error is an assignee of the judgment, but nothing turns upon

[29] In the omitted portion of the opinion it was held that the defense of fraud might be set up in a justice's court.

[30] As to fraud in acquiring jurisdiction, see Jaster v. Currie, 198 U. S. 144, 25 Sup. Ct. 614, 49 L. Ed. 988 (1905); Abercrombie v. Abercrombie, 64 Kan. 29, 67 Pac. 539 (1902); and as to effect of fraud in general, see 94 Am. St. Rep. 549–550; 103 Am. St. Rep. 313–316; 23 Cyc. 1589–1591; Freeman on Judgments (4th Ed.) § 576; Black on Judgments (2d Ed.) §§ 917–921.

that.) The plea was demurred to on constitutional grounds, and the demurrer was overruled, subject to exception. Thereupon replications were filed, again setting up the Constitution of the United States (article 4, § 1), and were demurred to. The Supreme Court of Mississippi held the plea good and the replications bad, and judgment was entered for the defendant. Thereupon the case was brought here.

The main argument urged by the defendant to sustain the judgment below is addressed to the jurisdiction of the Mississippi courts.

The laws of Mississippi make dealing in futures a misdemeanor, and provide that contracts of that sort, made without intent to deliver the commodity or to pay the price, "shall not be enforced by any court." Annotated Code of 1892, §§ 1120, 1121, 2117. The defendant contends that this language deprives the Mississippi courts of jurisdiction, and that the case is like Anglo-American Provision Co. v. Davis Provision Co., 191 U. S. 373, 24 Sup. Ct. 92, 48 L. Ed. 225. There the New York statutes refused to provide a court into which a foreign corporation could come, except upon causes of action arising within the state, etc., and it was held that the state of New York was under no constitutional obligation to give jurisdiction to its Supreme Court against its will. One question is whether that decision is in point.

No doubt it sometimes may be difficult to decide whether certain words in a statute are directed to jurisdiction or to merits, but the distinction between the two is plain. One goes to the power, the other only to the duty, of the court. Under the common law it is the duty of a court of general jurisdiction not to enter a judgment upon a parol promise made without consideration; but it has power to do it, and, if it does, the judgment is unimpeachable, unless reversed. Yet a statute could be framed that would make the power, that is, the jurisdiction, of the court, dependent upon whether there was a consideration or not. Whether a given statute is intended simply to establish a rule of substantive law, and thus to define the duty of the court, or is meant to limit its power, is a question of construction and common sense. When it affects a court of general jurisdiction, and deals with a matter upon which that court must pass, we naturally are slow to read ambiguous words as meaning to leave the judgment open to dispute, or as intended to do more than to fix the rule by which the court should decide.

The case quoted concerned a statute plainly dealing with the authority and jurisdiction of the New York court. The statute now before us seems to us only to lay down a rule of decision. The Mississippi court in which this action was brought is a court of general jurisdiction and would have to decide upon the validity of the bar, if the suit upon the award or upon the original cause of action had been brought there. The words "shall not be enforced by any court" are simply another, possibly less emphatic, way of saying that an action shall not be brought to enforce such contracts. As suggested by the counsel for the plaintiff in error, no one would say that the words of

the Mississippi statute of frauds, "An action shall not be brought whereby to charge a defendant" (Code 1892, § 4225), go to the jurisdiction of the court. Of course it could be argued that logically they had that scope, but common sense would revolt. See 191 U. S. 375, 24 Sup. Ct. 93 (48 L. Ed. 227). A stronger case than the present is General Oil Co. v. Crain, 209 U. S. 211, 216, 28 Sup. Ct. 475, 52 L. Ed. 754. We regard this question as open under the decisions below, and we have expressed our opinion upon it independent of the effect of the judgment, although it might be that, even if jurisdiction of the original cause of action was withdrawn, it remained with regard to a suit upon a judgment based upon an award, whether the judgment or award was conclusive or not. But it might be held that the law as to jurisdiction in one case followed the law in the other, and therefore we proceed at once to the further question, whether the illegality of the original cause of action in Mississippi can be relied upon there as a ground for denying a recovery upon a judgment of another state.

The doctrine laid down by Chief Justice Marshall was "that the judgment of a state court should have the same credit, validity, and effect in every other court in the United States which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court of the United States." Hampton v. McConnel, 3 Wheat. 234, 4 L. Ed. 378. There is no doubt that this quotation was supposed to be an accurate statement of the law as late as Christmas v. Russell, 5 Wall. 290, 18 L. Ed. 475, where an attempt of Mississippi, by statute, to go behind judgments recovered in other states, was declared void, and it was held that such judgments could not be impeached even for fraud.

But the law is supposed to have been changed by the decision in Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239. That was a suit brought in this court by the state of Wisconsin upon a Wisconsin judgment against a foreign corporation. The judgment was for a fine or penalty imposed by the Wisconsin statutes upon such corporations doing business in the state and failing to make certain returns, and the ground of decision was that the jurisdiction given to this court by article 3, § 2, as rightly interpreted by the judiciary act, now Rev. St. § 687 (U. S. Comp. St. 1901, p. 565), was confined to "controversies of a civil nature," which the judgment in suit was not. The case was not within the words of article 4, § 1, and, if it had been, still it would not have, and could not have, decided anything relevant to the question before us. It is true that language was used which has been treated as meaning that the original claim upon which a judgment is based may be looked into further than Chief Justice Marshall supposed. But evidently it meant only to justify the conclusion reached upon the specific point decided, for the proviso was inserted that a court "cannot go behind the judgment for the purpose of examining into the validity of the claim." 127 U. S. 293, 8 Sup. Ct. 1375 (32 L. Ed. 239). However,

the whole passage was only a dictum and it is not worth while to spend much time upon it.

We assume that the statement of Chief Justice Marshall is correct. It is confirmed by Act May 26, 1790, c. 11, 1 Stat. 122 (Rev. St. § 905; U. S. Comp. St. 1901, p. 677), providing that the said records and judicial proceedings "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken." See, further, Tilt v. Kelsey, 207 U. S. 43, 57, 28 Sup. Ct. 1, 52 L. Ed. 95. Whether the award would or would not have been conclusive, and whether the ruling of the Missouri court upon that matter was right or wrong, there can be no question that the judgment was conclusive in Missouri on the validity of the cause of action. Pitts v. Fugate, 41 Mo. 405; State ex rel. Hudson v. Trammel, 106 Mo. 510, 17 S. W. 502; In re Copenhaver, 118 Mo. 377, 24 S. W. 161, 40 Am. St. Rep. 382. A judgment is conclusive as to all the media concludendi (United States v. California & O. Land Co., 192 U. S. 355, 24 Sup. Ct. 266, 48 L. Ed. 476); and it needs no authority to show that it cannot be impeached either in or out of the state by showing that it was based upon a mistake of law. Of course, a want of jurisdiction over either the person or the subject-matter might be shown. Andrews v. Andrews, 188 U. S. 14, 23 Sup. Ct. 237, 47 L. Ed. 366; Clarke v. Clarke, 178 U. S. 186, 20 Sup. Ct. 873, 44 L. Ed. 1028. But, as the jurisdiction of the Missouri court is not open to dispute, the judgment cannot be impeached in Mississippi even if it went upon a misapprehension of the Mississippi law. See Godard v. Gray, L. R. 6 Q. B. 139; MacDonald v. Grand Trunk R. Co., 71 N. H. 448, 52 Atl. 982, 59 L. R. A. 448, 93 Am. St. Rep. 550; Peet v. Hatcher, 112 Ala. 514, 21 South. 11, 57 Am. St. Rep. 45.

We feel no apprehensions that painful or humiliating consequences will follow upon our decision. No court would give judgment for a plaintiff unless it believed that the facts were a cause of action by the law determining their effect. Mistakes will be rare. In this case the Missouri court no doubt supposed that the award was binding by the law of Mississippi. If it was mistaken, it made a natural mistake. The validity of its judgment, even in Mississippi, is, as we believe, the result of the Constitution as it always has been understood, and is not a matter to arouse the susceptibilities of the states, all of which are equally concerned in the question and equally on both sides.

Judgment reversed.[31]

[31] The dissenting opinion of White, J., with whom concurred Harlan, McKenna, and Day, JJ., has been omitted.

HILTON v. GUYOT.

(Supreme Court of the United States, 1895. 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95.)

The first of these two cases was an action at law, brought December 18, 1885 in the Circuit Court of the United States for the Southern District of New York, by Gustave Bertin Guyot, as official liquidator of the firm of Charles Fortin & Co., and by the surviving members of that firm, all aliens and citizens of the Republic of France, against Henry Hilton and William Libbey, citizens of the United States and the state of New York, and trading as copartners, in the cities of New York and Paris and elsewhere, under the firm name of A. T. Stewart & Co. The action was upon a judgment recovered in a French court at Paris in the Republic of France by the firm of Charles Fortin & Co., all whose members were French citizens, against Hilton and Libbey, trading as copartners as aforesaid, and citizens of the United States and of the state of New York.

In their answer defendants alleged in substance that the French court had no jurisdiction over them for want of proper citation or appearance; that they had not had a full and fair trial, the arbitrator and the court having been deceived and misled by false and fraudulent accounts introduced by Fortin & Co. and by hearsay testimony given without the solemnity of an oath and without cross-examination, and by the fraudulent suppression of books and papers; that it would be contrary to natural justice to enforce the judgment without an examination of its merits and that if such a judgment had been obtained in the United States, its merits would be re-examined by the French courts before it would be enforced.

The defendants, on June 22, 1888, filed a bill in equity against the plaintiffs, setting forth the same matters as in their answer to the action at law, and praying for a discovery and for an injunction against the prosecution of the action. To that bill a plea was filed, setting up the French judgment; and upon a hearing the bill was dismissed (42 Fed. 249). From the decree dismissing the bill an appeal was taken which was the second case now before the court.

The action at law afterwards came on for trial by a jury. The court directed a verdict for the plaintiffs in the sum of $277,775.44, being the amount of the French judgment and interest. Defendants sued out a writ of error.

The writ of error in the action at law and the appeal in the suit in equity were argued together in January, 1894, and, by direction of the court, were reargued in April, 1894.[32]

GRAY, J.[33] * * * In order to appreciate the weight of the va-

[32] This brief statement of facts has been substituted for that of the original report.

[33] Portions of the opinion have been omitted.

rious authorities cited at the bar, it is important to distinguish different kinds of judgments. Every foreign judgment, of whatever nature, in order to be entitled to any effect, must have been rendered by a court having jurisdiction of the cause, and upon regular proceedings, and due notice. In alluding to different kinds of judgments, therefore, such jurisdiction, proceedings, and notice will be assumed. It will also be assumed that they are untainted by fraud, the effect of which will be considered later.

A judgment in rem, adjudicating the title to a ship or other movable property within the custody of the court, is treated as valid everywhere. As said by Chief Justice Marshall: "The sentence of a competent court, proceeding in rem, is conclusive with respect to the thing itself, and operates as an absolute change of the property. By such sentence the right of the former owner is lost, and a complete title given to the person who claims under the decree. No court of co-ordinate jurisdiction can examine the sentence. The question, therefore, respecting its conformity to general or municipal law can never arise, for no co-ordinate tribunal is capable of making the inquiry." Williams v. Armroyd, 7 Cranch, 423, 432, 3 L. Ed. 392. The most common illustrations of this are decrees of courts of admiralty and prize, which proceed upon principles of international law. Croudson v. Leonard, 4 Cranch, 434, 2 L. Ed. 670; Williams v. Armroyd, above cited; Ludlow v. Dale, 1 Johns. Cas. 16. But the same rule applies to judgments in rem under municipal law. Hudson v. Guestier, 4 Cranch, 293, 2 L. Ed. 625; Ennis v. Smith, 14 How. 400, 430, 14 L. Ed. 472; Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 291, 8 Sup. Ct. 1370, 32 L. Ed. 239; Scott v. McNeal, 154 U. S. 34, 46, 14 Sup. Ct. 1108, 38 L. Ed. 896; Castrique v. Imrie, L. R. 4 H. L. 414; Monroe v. Douglas, 4 Sandf. Ch. (N. Y.) 126.

A judgment affecting the status of persons, such as a decree confirming or dissolving a marriage, is recognized as valid in every country, unless contrary to the policy of its own law. Cottington's Case, 2 Swanst. 326; Roach v. Garvan, 1 Ves. Sr. 157; Harvey v. Farnie, 8 App. Cas. 43; Cheely v. Clayton, 110 U. S. 701, 4 Sup. Ct. 328, 28 L. Ed. 298. It was of a foreign sentence of divorce that Lord Chancellor Nottingham, in the house of lords, in 1688, in Cottington's Case, above cited, said: "It is against the law of nations not to give credit to the judgments and sentences of foreign countries till they be reversed by the law, and according to the form, of those countries wherein they were given; for what right hath one kingdom to reverse the judgment of another? And how can we refuse to let a sentence take place till it be reversed? And what confusion would follow in Christendom, if they should serve us so abroad, and give no credit to our sentences!"

Other judgments, not strictly in rem, under which a person has been compelled to pay money, are so far conclusive that the justice of the payment cannot be impeached in another country, so as to compel

him to pay it again. For instance, a judgment in foreign attachment is conclusive, as between the parties, of the right to the property or money attached. Story, Confl. Laws (2d Ed.) § 592a. And if, on the dissolution of a partnership, one partner promises to indemnify the other against the debts of the partnership, a judgment for such a debt, under which the latter has been compelled to pay it, is conclusive evidence of the debt in a suit by him to recover the amount upon the promise of indemnity. It was of such a judgment, and in such a suit, that Lord Nottingham said: "Let the plaintiff receive back so much of the money brought into court as may be adequate to the sum paid on the sentence for custom, the justice whereof is not examinable here." Gold v. Canaham (1689) 2 Swanst. 325, 1 Ch. Cas. 311. See, also, Tarleton v. Tarleton, 4 Maule & S. 20; Konitzky v. Meyer, 49 N. Y. 571.

Other foreign judgments which have been held conclusive of the matter adjudged were judgments discharging obligations contracted in the foreign country between citizens or residents thereof. Story, Confl. Laws, §§ 330–341; May v. Breed, 7 Cush. (Mass.) 15, 54 Am. Dec. 700. Such was the case cited at the bar of Burroughs (or Burrows) v. Jamineau (or Jemino), Moseley, 1, 2 Strange, 733, 2 Eq. Cas. Abr. p. 525, pl. 7, 12 Vin. Abr. p. 87, pl. 9, Sel. Cas. Ch. 69, and 1 Dickens, 48. * * *

The extraterritorial effect of judgments in personam, at law, or in equity may differ, according to the parties to the cause. A judgment of that kind between two citizens or residents of the country, and thereby subject to the jurisdiction in which it is rendered, may be held conclusive as between them everywhere. So, if a foreigner invokes the jurisdiction by bringing an action against a citizen, both may be held bound by a judgment in favor of either; and if a citizen sues a foreigner, and judgment is rendered in favor of the latter, both may be held equally bound. Ricardo v. Garcias, 12 Clark & F. 368; The Griefswald, Swab. 430, 435; Barber v. Lamb, 8 C. B. (N. S.) 95; Lea v. Deakin, 11 Biss. 23, Fed. Cas. No. 8,154.

The effect to which a judgment, purely executory, rendered in favor of a citizen or resident of the country, in a suit there brought by him against a foreigner, may be entitled in an action thereon against the latter in his own country, as is the case now before us, presents a more difficult question, upon which there has been some diversity of opinion.

Early in the last century it was settled in England that a foreign judgment on a debt was considered, not like a judgment of a domestic court of record, as a record or a specialty, a lawful consideration for which was conclusively presumed, but as a simple contract only. * * *

[The learned justice here examined in detail the early English cases.]

The English cases above referred to have been stated with the more particularity and detail, because they directly bear upon the question,

what was the English law, being then our own law, before the Declaration of Independence. They demonstrate that by that law, as generally understood, and as declared by Hardwicke, Mansfield, Buller, Camden, Eyre, and Ellenborough, and doubted by Kenyon only, a judgment recovered in a foreign country for a sum of money, when sued upon in England, was only prima facie evidence of the demand, and subject to be examined and impeached. The law of England since it has become to us a foreign country will be considered afterwards. * * *

The decisions of this court have clearly recognized that judgments of a foreign state are prima facie evidence only, and that, but for these constitutional and legislative provisions, judgments of a state of the Union, when sued upon in another state, would have no greater effect. * * *

[The learned justice here commented upon Croudson v. Leonard, 4 Cranch, 434, 2 L. Ed. 670; Mills v. Duryee, 7 Cranch, 481, 3 L. Ed. 411; Hampton v. McConnel, 3 Wheat. 234, 4 L. Ed. 378; McElmoyle v. Cohen, 13 Pet. 312, 10 L. Ed. 177; D'Arcy v. Ketchum, 11 How. 165, 13 L. Ed. 648; Christmas v. Russell, 5 Wall. 290, 18 L. Ed. 475; Bischoff v. Wethered, 9 Wall. 812, 19 L. Ed. 829; Hanley v. Donoghue, 116 U. S. 1, 6 Sup. Ct. 242, 29 L. Ed. 535; Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239.]

But neither in those cases nor in any other has this court hitherto been called upon to determine how far foreign judgments may be re-examined upon their merits, or be impeached for fraud in obtaining them. * * *

It clearly appears that, at the time of the separation of this country from England, the general rule was fully established that foreign judgments in personam were prima facie evidence only, and not conclusive of the merits of the controversy between the parties. But the extent and limits of the application of that rule do not appear to have been much discussed, or defined with any approach to exactness, in England or America, until the matter was taken up by Chancellor Kent and by Mr. Justice Story. * * *

Mr. Justice Story and Chancellor Kent, as appears by the passages above quoted from their Commentaries, concurred in the opinion that, in a suit upon a foreign judgment, the whole merits of the case could not, as matter of course, be re-examined anew, but that the defendant was at liberty to impeach the judgment, not only by showing that the court had no jurisdiction of the case or of the defendant, but also by showing that it was procured by fraud, or was founded on clear mistake or irregularity, or was bad by the law of the place where it was rendered. Story, Confl. Laws, § 607; 2 Kent, Comm. (6th Ed.) 120.

Am. doctrine.

The word "mistake" was evidently used by Story and Kent, in this connection, not in its wider meaning of error in judgment, whether upon the law or upon the facts, but in the stricter sense of misappre-

hension or oversight, and as equivalent to what, in Burnham v. Webster, before cited, Mr. Justice Woodbury spoke of as "some objection to the judgment's reaching the merits, and tending to prove that they had not been acted on," "some accident or mistake," or "that the court did not decide at all on the merits." 1 Woodb. & M. 180, Fed. Cas. No. 2,179.

The suggestion that a foreign judgment might be impeached for error in law of the country in which it was rendered is hardly consistent with the statement of Chief Justice Marshall, when, speaking of the disposition of this court to adopt the construction given to the laws of a state by its own courts, he said: "This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus, no court in the universe which professed to be governed by principle would, we presume, undertake to say that the courts of Great Britain or of France or of any other nation had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute." Elmendorf v. Taylor, 10 Wheat. 152, 159, 160, 6 L. Ed. 289.

In recent times, foreign judgments rendered within the dominions of the English crown, and under the law of England, after a trial on the merits, and no want of jurisdiction and no fraud or mistake being shown or offered to be shown, have been treated as conclusive by the highest courts of New York, Maine, and Illinois. Lazier v. Westcott, 26 N. Y. 146, 150, 82 Am. Dec. 404; Dunstan v. Higgins, 138 N. Y. 70, 74, 33 N. E. 729, 20 L. R. A. 668, 34 Am. St. Rep. 431; Rankin v. Goddard, 54 Me. 28, 89 Am. Dec. 718; Id., 55 Me. 389; Baker v. Palmer, 83 Ill. 568. In two early cases in Ohio it was said that foreign judgments were conclusive, unless shown to have been obtained by fraud. Silver Lake Bank v. Harding, 5 Ohio, 545, 547; Anderson v. Anderson, 8 Ohio, 108, 110. But in a later case in that state it was said that they were only prima facie evidence of indebtedness. Pelton v. Platner, 13 Ohio, 209, 217, 42 Am. Dec. 197. In Jones v. Jamison, 15 La. Ann. 35, the decision was only that, by virtue of the statutes of Louisiana, a foreign judgment merged the original cause of action as against the plaintiff.

The result of the modern decisions in England, after much diversity, not to say vacillation, of opinion, does not greatly differ (so far as concerns the aspects in which the English courts have been called upon to consider the subject) from the conclusions of Chancellor Kent and of Justices Story and Woodbury. * * *

[The learned justice here examined the English cases and continued as follows:]

In view of all the authorities upon the subject, and of the trend of judicial opinion in this country and in England, following the lead of Kent and Story, we are satisfied that where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact. The defendants, therefore, cannot be permitted, upon that general ground, to contest the validity or the effect of the judgment sued on.

But they have sought to impeach that judgment upon several other grounds, which require separate consideration.

It is objected that the appearance and litigation of the defendants in the French tribunals were not voluntary, but by legal compulsion, and, therefore, that the French courts never acquired such jurisdiction over the defendants that they should be held bound by the judgment.

Upon the question what should be considered such a voluntary appearance, as to amount to a submission to the jurisdiction of a foreign court, there has been some difference of opinion in England. * * *

But it is now settled in England that while an appearance by the defendant in a court of a foreign country, for the purpose of protecting his property already in the possession of that court, may not be deemed a voluntary appearance, yet an appearance solely for the purpose of protecting other property in that country from seizure is considered as a voluntary appearance. De Cosse Brissac v. Rathbone (1861) 6 Hurl. & N. 301, 30 Law J. Exch. 238; Schibsby v. Westenholz (1870) L. R. 6 Q. B. 155, 162; Voinet v. Barrett (1885) 1 Cab. & El. 554, 54 Law J. Q. B. 521, and 55 Law J. Q. B. 39.

The present case is not one of a person traveling through or casually found in a foreign country. The defendants, although they were not citizens or residents of France, but were citizens and residents of the state of New York, and their principal place of business was in the city of New York, yet had a storehouse and an agent in Paris, and were accustomed to purchase large quantities of goods there, although they did not make sales in France. Under such circumstances, evidence that their sole object in appearing and carrying on the litigation in the French courts was to prevent property in their storehouse at Paris, belonging to them, and within the jurisdiction, but not in the custody, of those courts, from being taken in satisfaction of any judgment that might be recovered against them, would not, according to our

law, show that those courts did not acquire jurisdiction of the persons of the defendants.

It is next objected that in those courts one of the plaintiffs was permitted to testify not under oath, and was not subjected to cross-examination by the opposite party, and that the defendants were therefore deprived of safeguards which are by our law considered essential to secure honesty and to detect fraud in a witness; and also that documents and papers were admitted in evidence, with which the defendants had no connection, and which would not be admissible under our own system of jurisprudence. But it having been shown by the plaintiffs, and hardly denied by the defendants, that the practice followed and the method of examining witnesses were according to the laws of France, we are not prepared to hold that the fact that the procedure in these respects differed from that of our own courts is, of itself, a sufficient ground for impeaching the foreign judgment. * * *

There is no doubt that both in this country, as appears by the authorities already cited, and in England, a foreign judgment may be impeached for fraud. * * *

Under what circumstances this may be done does not appear to have ever been the subject of judicial investigation in this country.

It has often, indeed, been declared by this court that the fraud which entitles a party to impeach the judgment of one of our own tribunals must be fraud extrinsic to the matter tried in the cause, and not merely consist in false and fraudulent documents or testimony submitted to that tribunal, and the truth of which was contested before it and passed upon by it. United States v. Throckmorton, 98 U. S. 61, 65, 66, 25 L. Ed. 93; Vance v. Burbank, 101 U. S. 514, 519, 25 L. Ed. 929; Steel v. St. Louis Smelting & Refining Co., 106 U. S. 447, 453, 1 Sup. Ct. 389, 27 L. Ed. 226; Moffat v. United States, 112 U. S. 24, 32, 5 Sup. Ct. 10, 28 L. Ed. 623; United States v. Minor, 114 U. S. 233, 242, 5 Sup. Ct. 836, 29 L. Ed. 110. And in one English case, where a ship had been sold under a foreign judgment, the like restriction upon impeaching that judgment for fraud was suggested; but the decision was finally put upon the ground that the judicial sale passed the title to the ship. Cammell v. Sewell (1858–60) 3 Hurl. & N. 617, 646, 5 Hurl. & N. 728, 729, 742.

But it is now established in England, by well-considered and strongly-reasoned decisions of the court of appeal, that foreign judgments may be impeached, if procured by false and fraudulent representations and testimony of the plaintiff, even if the same question of fraud was presented to and decided by the foreign court.

[The learned justice here commented upon Abouloff v. Oppenheimer (1882) 10 Q. B. D. 295; Vadala v. Lawes (1890) 25 Q. B. D. 310; Crozat v. Brogden (1894) 2 Q. B. 30.]

In the case at bar the defendants offered to prove, in much detail, that the plaintiffs presented to the French court of first instance and to the arbitrator appointed by that court, and upon whose report its

judgment was largely based, false and fraudulent statements and accounts against the defendants, by which the arbitrator and the French courts were deceived and misled, and their judgments were based upon such false and fraudulent statements and accounts. This offer, if satisfactorily proved, would, according to the decisions of the English court of appeal in Abouloff v. Oppenheimer, Vadala v. Lawes, and Crozat v. Brogden, above cited, be a sufficient ground for impeaching the foreign judgment, and examining into the merits of the original claim.

But whether those decisions can be followed in regard to foreign judgments, consistently with our own decisions as to impeaching domestic judgments for fraud, it is unnecessary in this case to determine, because there is a distinct and independent ground upon which we are satisfied that the comity of our nation does not require us to give conclusive effect to the judgments of the courts of France; and that ground is the want of reciprocity, on the part of France, as to the effect to be given to the judgments of this and other foreign countries.

[The learned justice here examined the law of France and the law of the continental countries with respect to the enforcement of foreign judgments.]

It appears, therefore, that there is hardly a civilized nation on either continent which, by its general law, allows conclusive effect to an executory foreign judgment for the recovery of money. In France and in a few smaller states—Norway, Portugal, Greece, Monaco, and Hayti—the merits of the controversy are reviewed, as of course, allowing to the foreign judgment, at the most, no more effect than of being prima facie evidence of the justice of the claim. In the great majority of the countries on the continent of Europe—in Belgium, Holland, Denmark, Sweden, Germany, in many cantons of Switzerland, in Russia and Poland, in Roumania, in Austria and Hungary (perhaps in Italy), and in Spain—as well as in Egypt, in Mexico, and in a great part of South America, the judgment rendered in a foreign country is allowed the same effect only as the courts of that country allow to the judgments of the country in which the judgment in question is sought to be executed.

The prediction of Mr. Justice Story in section 618 of his Commentaries on the Conflict of Laws, already cited, has thus been fulfilled, and the rule of reciprocity has worked itself firmly into the structure of international jurisprudence.

The reasonable, if not the necessary, conclusion appears to us to be that judgments rendered in France, or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are prima facie evidence only of the justice of the plaintiffs' claim.

In holding such a judgment, for want of reciprocity, not to be conclusive evidence of the merits of the claim, we do not proceed upon

any theory of retaliation upon one person by reason of injustice done to another, but upon the broad ground that international law is founded upon mutuality and reciprocity, and that by the principles of international law recognized in most civilized nations, and by the comity of our own country, which it is our judicial duty to know and to declare, the judgment is not entitled to be considered conclusive.

By our law, at the time of the adoption of the constitution, a foreign judgment was considered as prima facie evidence, and not conclusive. There is no statute of the United States, and no treaty of the United States with France, or with any other nation, which has changed that law, or has made any provision upon the subject. It is not to be supposed that, if any statute or treaty had been or should be made, it would recognize as conclusive the judgments of any country, which did not give like effect to our own judgments. In the absence of statute or treaty, it appears to us equally unwarrantable to assume that the comity of the United States requires anything more.

If we should hold this judgment to be conclusive, we should allow it an effect to which, supposing the defendants' offers to be sustained by actual proof, it would, in the absence of a special treaty, be entitled in hardly any other country in Christendom, except the country in which it was rendered. If the judgment had been rendered in this country, or in any other outside of the jurisdiction of France, the French courts would not have executed or enforced it, except after examining into its merits. The very judgment now sued on would be held inconclusive in almost any other country than France. In England, and in the colonies subject to the law of England, the fraud alleged in its procurement would be a sufficient ground for disregarding it. In the courts of nearly every other nation, it would be subject to re-examination, either merely because it was a foreign judgment, or because judgments of that nation would be re-examinable in the courts of France.

For these reasons, in the action at law, the

Judgment is reversed, and the cause remanded to the circuit court, with directions to set aside the verdict and to order a new trial.

For the same reasons, in the suit in equity between these parties, the foreign judgment is not a bar, and therefore the

Decree dismissing the bill is reversed, the plea adjudged bad, and the cause remanded to the circuit court for further proceedings not inconsistent with this opinion.

FULLER, C. J. (dissenting). Plaintiffs brought their action on a judgment recovered by them against the defendants in the courts of France, which courts had jurisdiction over person and subject-matter, and in respect of which judgment no fraud was alleged, except in particulars contested in and considered by the French courts. The question is whether under these circumstances, and in the absence of a treaty or act of congress, the judgment is re-examinable upon the merits. This question I regard as one to be determined by the ordinary and

settled rule in respect of allowing a party who has had an opportunity to prove his case in a competent court to retry it on the merits; and it seems to me that the doctrine of res judicata applicable to domestic judgments should be applied to foreign judgments as well, and rests on the same general ground of public policy, that there should be an end of litigation.

This application of the doctrine is in accordance with our own jurisprudence, and it is not necessary that we should hold it to be required by some rule of international law. The fundamental principle concerning judgments is that disputes are finally determined by them, and I am unable to perceive why a judgment in personam, which is not open to question on the ground of want of jurisdiction, either intrinsically or over the parties, or of fraud, or on any other recognized ground of impeachment, should not be held, inter partes, though recovered abroad, conclusive on the merits.

Judgments are executory while unpaid, but in this country execution is not given upon a foreign judgment as such, it being enforced through a new judgment obtained in an action brought for that purpose.

The principle that requires litigation to be treated as terminated by final judgment, properly rendered, is as applicable to a judgment proceeded on in such an action as to any other, and forbids the allowance to the judgment debtor of a retrial of the original cause of action, as of right, in disregard of the obligation to pay arising on the judgment, and of the rights acquired by the judgment creditor thereby.

That any other conclusion is inadmissible is forcibly illustrated by the case in hand. Plaintiffs in error were trading copartners in Paris as well as in New York, and had a place of business in Paris at the time of these transactions and of the commencement of the suit against them in France. The subjects of the suit were commercial transactions, having their origin, and partly performed, in France, under a contract there made, and alleged to be modified by the dealings of the parties there, and one of the claims against them was for goods sold to them there. They appeared generally in the case, without protest, and by counterclaims relating to the same general course of business, a part of them only connected with the claims against them, became actors in the suit, and submitted to the courts their own claims for affirmative relief, as well as the claims against them. The courts were competent, and they took the chances of a decision in their favor. As traders in France they were under the protection of its laws, and were bound by its laws, its commercial usages, and its rules of procedure. The fact that they were Americans and the opposite parties were citizens of France is immaterial, and there is no suggestion on the record that those courts proceeded on any other ground than that all litigants, whatever their nationality, were entitled to equal justice therein. If plaintiffs in error had succeeded in their cross suit and recovered judgment against defendants in error, and had sued them here on that

judgment, defendants in error would not have been permitted to say that the judgment in France was not conclusive against them. As it was, defendants in error recovered, and I think plaintiffs in error are not entitled to try their fortune anew before the courts of this country on the same matters voluntarily submitted by them to the decision of the foreign tribunal. We are dealing with the judgment of a court of a civilized country, whose laws and system of justice recognize the general rules in respect to property and rights between man and man prevailing among all civilized peoples. Obviously, the last persons who should be heard to complain are those who identified themselves with the business of that country, knowing that all their transactions there would be subject to the local laws and modes of doing business. The French courts appear to have acted "judicially, honestly, and with the intention to arrive at the right conclusion," and a result thus reached ought not to be disturbed.

[After quoting from Nouvion v. Freeman, L. R. 15 App. Cas. 1, and Godard v. Gray, L. R. 6 Q. B. 139, the learned Chief Justice continued as follows:]

In any aspect, it is difficult to see why rights acquired under foreign judgments do not belong to the category of private rights acquired under foreign laws. Now, the rule is universal in this country that private rights acquired under the laws of foreign states will be respected and enforced in our courts unless contrary to the policy or prejudicial to the interests of the state where this is sought to be done; and, although the source of this rule may have been the comity characterizing the intercourse between nations, it prevails to-day by its own strength, and the right to the application of the law to which the particular transaction is subject is a juridical right.

And, without going into the refinements of the publicists on the subject, it appears to me that that law finds authoritative expression in the judgments of courts of competent jurisdiction over parties and subject-matter.

It is held by the majority of the court that defendants cannot be permitted to contest the validity and effect of this judgment on the general ground that it was erroneous in law or in fact, and the special grounds relied on are seriatim rejected. In respect of the last of these —that of fraud—it is said that it is unnecessary in this case to decide whether certain decisions cited in regard to impeaching foreign judgments for fraud could be followed consistently with our own decisions as to impeaching domestic judgments for that reason, "because there is a distinct and independent ground upon which we are satisfied that the comity of our nation does not require us to give conclusive effect to the judgments of the courts of France, and that ground is the want of reciprocity on the part of France as to the effect to be given to the judgments of this and other foreign countries." And the conclusion is announced to be "that judgments rendered in France, or in any other foreign country, by the laws of which our own judgments

are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are prima facie evidence only of the justice of the plaintiff's claim." In other words, that, although no special ground exists for impeaching the original justice of a judgment, such as want of jurisdiction or fraud, the right to retry the merits of the original cause at large, defendant being put upon proving those merits, should be accorded in every suit on judgments recovered in countries where our own judgments are not given full effect, on that ground merely.

I cannot yield my assent to the proposition that, because by legislation and judicial decision in France that effect is not there given to judgments recovered in this country which, according to our jurisprudence, we think should be given to judgments wherever recovered (subject, of course, to the recognized exceptions), therefore we should pursue the same line of conduct as respects the judgments of French tribunals. The application of the doctrine of res judicata does not rest in discretion; and it is for the government, and not for its courts, to adopt the principle of retorsion, if deemed under any circumstances desirable or necessary.

As the court expressly abstains from deciding whether the judgment is impeachable on the ground of fraud, I refrain from any observations on that branch of the case.[34]

[34] Harlan, Brewer, and Jackson, JJ., concurred in the dissent.

CONTINENTAL LAW.—a. *In General.*—A suit upon a foreign judgment will not lie, since a judgment does not constitute a new cause of action. 16 R. G. 427 (June 30, 1886). Execution may be had upon the foreign judgment as such, provided it has been declared executory by a domestic tribunal. *Germany*, section 722, Code Civ. Proc.; *France*, section 546, Code Civ. Proc.; *Italy*, section 559, Code Civ. Proc.

Judgments concerning capacity, status, and the like require no exequatur before being entitled to recognition. *France*, App. Paris, April 6, 1903 (D. 1904, 2, 273); App. Nancy, April 25, 1885 (D. 1886, 2, 131); *Germany*, section 328, Code Civ. Proc.; *Italy*, App. Rome, April 23, 1887 (La Legge 1888, 1, 633). Provided, however, no acts of execution are in question. *France*, Cass. March 9, 1853 (S. 1853, 1, 269); *Italy*, App. Milan, Oct. 13, 1891 (S. 1892, 4, 29). But an exequatur may be obtained, though no immediate execution is contemplated. App. Turin, Dec. 9, 1893 (S. 1894, 4, 9).

Consult, also, E. Bartin, Étude sur les effets internationaux des jugements, 31 Clunet, 5–39, 802–820; 32 Clunet, 59–95, 815–850; 33 Clunet, 27–47, 995–1016; Ch. Lachau, Traités et projets de traités internationaux sur la compétence judiciaire, sur l'autorité et l'exécution des jugements, 2 Darras, 66–93.

b. *Italy.*—According to article 941, Code Civ. Proc., an Italian court is authorized to examine a foreign judgment, before declaring it executory, only in the following respects: (1) whether the court had jurisdiction; (2) whether the parties were regularly cited; (3) whether the parties appeared or were legally defaulted; (4) whether the judgment contains anything contrary to the public order or the internal public law of Italy.

The merits of the judgment, even in the absence of reciprocity, are not subject to investigation, except by way of retorsion. See Cass. Turin, March 7, 1874 (Monitore 1874, p. 276).

As to judgments by default, consult App. Genoa, March 5, 1892 (Monitore 1892, p. 770; App. Genoa, Sept. 5, 1896 (La Legge, 1896, 2, 664), and note.

Consult, also, Charles-Francois Ansaldi, De l'exécution en Italie des juge-

EASTERN TOWNSHIP BANK v. H. S. BEEBE & CO.

(Supreme Court of Vermont, 1880. 53 Vt. 177, 38 Am. Rep. 665.)

BARRETT, J.[35] It is not claimed that the pendency of said suit in Canada, where this suit was brought, could bar a recovery in this suit. It is claimed that the judgments in said suit in Canada, rendered after the bringing of this suit, bar a recovery in this suit. It is not averred or claimed that said Canadian judgments have been satisfied by payment. So the only question is, whether said Canadian judgments merge the cause of action, in such a sense as to render it incapable of being the subject of a judgment in this suit.

It is not so merged unless it has become a debt of record, so that the record itself has become a cause of action, of its own vigor, to be declared upon as such, and when produced, is conclusive of the right. All the authorities agree that a suit in Vermont, for getting satisfaction of

ments étrangers emportant condamnation sur le simple défaut du défendeur, 34 Clunet, 639–647; P. Fiore, De l'exécution des actes et des jugements étrangers en Italie, 5 Clunet, 235–247, 6 Clunet, 244–250; G. Ottolenghi, De l'effet en Italie des jugements étrangers en matière d'état et de capacité, 29 Clunet, 760–783.

c. *Germany.*—If the conditions established by section 328, Code Civ. Proc., exist, an exequatur will be granted without a re-investigation of the merits even in the absence of treaty. One of the conditions is that reciprocity must be "guaranteed" with respect to the kind of judgment in question. R. G. Feb. 15, 1901 (11 Niemeyer, 88). As to when reciprocity is guaranteed, see 7 R. G. 406 (May 19, 1882); 21 R. O. H. G. 11 (June 3, 1876); R. G. April 7, 1888 (44 Seuffert's Archiv, 111).

Consult, also, L. Fuld, Ausländische Urteile und die deutsche Zivilprozessordnung, 8 Niemeyer, 369–384; J. Keidel, De la reconnaissance et de l'exécution des jugements étrangers en Allemagne, 26 Clunet, 663–687; Keyssner & L. Beauchet, Questions relatives à l'exécution des jugements étrangers en Allemagne, 10 Clunet, 239–247; Keyssner, De l'exécution des jugements étrangers dans l'empire d'Allemagne, 9 Clunet, 25–37; Max Klein, Das Erfordernis der verbürgten Gegenseitigkeit bei Vollstreckung ausländischer Urteile in Deutschland, 9 Niemeyer, 206–242; 6 Niemeyer, 97–133; 7 Niemeyer, 323–327; Max Klein, Bemerkungen zu der Frage, ob hinsichtlich der zur Vollstreckung zu bringenden Entscheidungen deutscher Gerichte in England die Gegenseitigkeit verbürgt erscheint, 6 Niemeyer, 398–402.

d. *France.*—French courts do not apply the doctrine of reciprocity, but, in the absence of treaty, will re-examine the merits of a foreign judgment before declaring it executory. Cass. June 28, 1881 (S. 1882, 1, 33); Cass. Feb. 9, 1892 (S. 1892, 1, 201); Cass. Dec. 9, 1903 (D. 1906, 1, 354).

As to how far such a foreign judgment is subject to review, see App. Nancy, July 6, 1877 (S. 1878, 2, 129); App. Paris, Feb. 20, 1908 (4 Darras, 636).

After the granting of the exequatur the foreign judgment will, upon proper allegations, produce the same effect as it would have in the country where it was rendered. Cass. Feb. 1892 (S. 1892, 1, 201); App. Paris, April 20, 1905 (1 Darras, 344).

Consult, also, Chr. Daguin, De l'exécution des jugements étrangers en France, 15 Clunet, 33–42; 16 Clunet, 39–59; A. Lainé, De l'exécution en France des sentences arbitrales étrangères, 26 Clunet, 641–654; A. Weiss, De l'exécution des sentences arbitrales étrangères en France, 2 Darras, 34–48.

[35] The statement of facts has been omitted.

the Canadian judgment, must be an action of assumpsit, counting upon an implied promise, arising from the fact of the existence of such judgment.

It is held in the cases that a foreign judgment when shown in evidence upon a matter within the jurisdiction of the court, and in which the court had jurisdiction of the parties, so that they were personally bound by the judgment, in the country where rendered, is conclusive upon the matter therein adjudicated. But it at the same time is held that the original cause of action is not so merged by that judgment that it is incapable of being the subject of a suit in a country foreign to that in which the judgment was recovered.

The books are uniform in making the distinction between merger of the cause of action and conclusiveness of effect, as matter of evidence, when the effect of a foreign judgment is brought in question in a suit upon the same original cause of action.

Whatever may be the reason for such distinction, it exists, and is established as a rule of law; and we see no occasion for annulling that rule in this state. In the many cases in which the subject of judgments as between the different states of the Union has been discussed and determined, the theory and logic have rested upon the provision of Const. U. S. art. 4, § 1, as to the faith and credit to be given to judgments of one state in the other states; and in all the cases it is assumed that but for such provision such judgments would not have that faith and credit, and would be foreign judgments. A specimen case of this kind is McGilvray v. Avery, 30 Vt. 538, in which the very able opinion drawn up by Judge Bennett, presents the established doctrine, and marks the true distinctions.

It is fundamental that a foreign judgment does not constitute a record debt, but is only evidence of obligation to pay. The indebtedness evidenced by a foreign judgment as a cause of action to be declared on, as the ground of recovery is that of simple contract, and the subject for a suit in assumpsit. In this case then the judgment in Canada, as a cause of action, is of no higher grade than the notes themselves. This legal fact is conclusive against the idea of the notes as a cause of action being merged by that judgment. It leaves that judgment as an instrument or means of evidence, showing conclusively the fact of indebtedness, and operating conclusively to that effect until satisfied. It is not the judgment, but the satisfaction of it, that renders it a bar to a recovery in the domestic government upon the original cause of action. This is in harmony with the conclusive effect given to a foreign judgment in favor of the defendant. The fact of such judgment is pleaded in bar, and is adduced as evidence to maintain the plea. This is the same, mutatis mutandis, as adducing the fact of a foreign judgment for the plaintiff to maintain his right of recovery against the defendants in his action of assumpsit upon that judgment. The confusion on this subject seems to result from not distinguishing between a domestic

judgment as constituting of itself a debt of record and a foreign judgment, which is only evidence of an indebtedness as upon a simple contract.

Judgment reversed and cause remanded.[36]

MacDONALD v. GRAND TRUNK R. CO.

(Supreme Court of New Hampshire, 1902. 71 N. H. 448, 52 Atl. 982, 59 L. R. A. 448, 93 Am. St. Rep. 550.)

Case to recover the value of goods destroyed by fire, through the defendants' negligence, while in their possession as common carriers. The pleadings and facts agreed by the parties were as follows: The goods in question were shipped upon the Allan steamship Sarmatian, at Glasgow, Scotland, under a bill of lading which was made a part of the case, for transportation to Toronto, Canada. The goods were received by the defendants at Portland, Me., for transportation upon the terms of the original bill of lading. While in transportation across this state, they were destroyed by fire resulting from a collision caused by the defendants' negligence. The goods were insured with the Mannheim Insurance Company, which has paid the plaintiffs, MacDonald & Co., their value, $2,469.50. Prior to the commencement of this action, the consignees, who are residents of Toronto, and the insurance company, brought suit before the high court of justice in the dominion of Canada, against the defendants, in which the present plaintiffs claimed to recover of the present defendants for the loss of the goods in question; and in that action, after hearing, judgment was rendered in favor of the defendants. The high court of justice is a court of record of general jurisdiction. It had jurisdiction of the parties to the action and of the subject-matter of the case, and the judgment rendered was a judgment upon the merits of the issue presented, and is not reversed. The defendants pleaded the judgment in bar of this action, and also pleaded that, by the terms of the bill of lading, they were protected from liability for loss from fire, whether due to their own negligence or otherwise, and from liability for any loss which could be covered by in-

[36]Accord: Bank of Australasia v. Harding [1850] 9 C. B. 661; Smith v. Nicolls, 5 Bing. N. C. 208 (1839); Wood v. Gamble, 11 Cush. (Mass.) 8, 59 Am. Dec. 135 (1853); Black on Judgments (2d Ed.) § 847. *Germany*, 16 R. G. 427 (June 30, 1886). Contra: Herman on Estoppel and Res Judicata, § 498. An intermediate position has been taken by Alaska Commercial Co. v. Debney, 2 Alaska, 303 (1904), where it is held that under the decision of Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95 (1895), a foreign judgment which is enforceable in this country will operate also as a merger of the cause of action. See, also, Piggott on Foreign Judgments, 27–32.

If payment is accepted under such foreign judgment, no suit will lie for the recovery of any balance alleged to be due upon the original cause of action. Taylor v. Hollard [1902] 1 K. B. 676.

surance. The pleadings and record in the suit referred to were made a part of the case.

PARSONS, J.[37] The plaintiffs, prior to the commencement of this suit, voluntarily submitted the claim which they now make against the defendants—their right to damages for the negligent destruction of their property while in the hands of the defendants as common carriers—to a judicial tribunal established by the government of which they were citizens, and to whose decrees they owe obedience. The tribunal to which they appealed was a court of record of general jurisdiction; it had jurisdiction of the parties and of the subject-matter of the controversy. Both parties appeared and were heard; the plaintiffs had full opportunity to present such matters of fact, and to argue such propositions of law, as they deemed essential to their case. The judgment was upon the merits, and against the plaintiffs. It is not claimed that, by any erroneous ruling of the court, the plaintiffs were prevented from fully and fairly presenting their case. Nor is it suggested that the court erred in its decision of the legal question which the parties considered decisive of their rights. No accident or mistake on the part of the plaintiffs in the presentation of their case is suggested. Fraud is not charged. It is apparent that, if the plaintiffs' claims had been sustained in Canada, the defendants would have been bound by the result, and would have been compelled to satisfy any judgment that might there have been obtained against them. Is there any reason why the plaintiffs, having compelled the defendants to litigate the claim made in this suit before a tribunal of the plaintiffs' selection, and having suffered defeat without fraud, accident, or mistake, and after a fair hearing, by the results of which the defendants were necessarily bound, should not also be everywhere bound by the judicial determination which they invoked, and be estopped from presenting before any other tribunal the claim once judicially decided against them? The judgment in Canada was final, and is not reversed. It is conclusive against the plaintiffs in their own country. As an expression of the will of the sovereign to whom their allegiance is due, they owe obedience thereto abroad as well as at home. Upon every ground of natural right and justice, it would seem that they should be debarred from invading the courts of another country to retry a controversy settled against them at home. * * *

It is urged that a foreign judgment, though admissible in evidence, is not conclusive, but is merely prima facie evidence. Support for this proposition is to be found in early English cases and dicta where the judgment was offered as evidence of debt in an action to recover the amount found due by the former judgment. In Phillips v. Hunter (1795) 2 H. Bl. 402, 410, a distinction was made by Lord Chief Justice Eyre between cases where a judgment was brought before

[37]A part of the opinion has been omitted.

an English court, upon the application of a successful party, to enforce and obtain the fruits of it against the defendant, and those cases where the defendant sets up the foreign judgment as a bar to a new suit with reference to the former subject-matter. "It is in one way only," he said, "that the sentence or judgment of the court of a foreign state is examinable in our courts, and that is, when the party who claims the benefit of it applies to our courts to enforce it. * * * In all other cases, we give entire faith and credit to the sentences of foreign courts, and consider them as conclusive upon us." The latter statement does not appear to have been questioned in England. Burrows v. Jemino, 2 Strange, 733; Boucher v. Lawson, Hardw. Cas. temp. 85, 87, 89; Barber v. Lamb, 8 C. B. (N. S.) 95; Ricardo v. Garcias, 12 Clark & F. 368. The distinction has, however, been abandoned, and foreign judgments are not now held examinable there to the extent suggested by Chief Justice Eyre. Bank v. Nias, 16 Adol. & E. 717; Scott v. Pilkington, 2 Best & S. 11; Godard v. Gray, L. R. 6 Q. B. 139.

At the time of the Revolution, it appears to have been understood, as the law of England, that a judgment offered as evidence of a debt, in an action by the plaintiff to obtain its fruit, was merely prima facie evidence, and examinable upon the merits. Hilton v. Guyot, 159 U. S. 113, 187, 16 Sup. Ct. 139, 40 L. Ed. 95. This view was followed by the early American cases, among which is the case of Robinson v. Prescott, 4 N. H. 450, and to this view is to be ascribed the expressions found in Bryant v. Ela, Smith, 396, 404; Thurber v. Blackbourne, 1 N. H. 242, 243; Taylor v. Barron, 30 N. H. 78, 95, 64 Am. Dec. 281. The American cases, however, adopted in full the distinction made in Phillips v. Hunter, which, it is said by Story, "has been very frequently recognized as having a just foundation in international justice," upon the ground that where a defendant sets up a foreign judgment as a bar to the proceedings, "if it has been pronounced by a competent tribunal, and carried into effect, the losing party has no right to institute a new suit elsewhere, and thus to bring the matter again into controversy; and the other party is not to lose the protection which the foreign judgment gave him. It is then res judicata, which ought to be received as conclusive evidence of right; and the exceptio rei judicatæ under such circumstances is entitled to universal conclusiveness and respect." Story, Confl. Laws, § 598; 2 Kent, Comm. 120. See Bigelow, Estop. 196–203; Freem. Judgm. § 592; Black, Judgm. § 228; Dicey, Confl. Laws, 417.

It has been said that "all the American cases agree that, where a foreign judgment comes incidently in question, it is conclusive" (Cummings v. Banks, 2 Barb. [N. Y.] 602, 605); and that "it is an established rule that a foreign judgment, when used by way of defense, is as conclusive to every intent as those of our own courts" (Griswold v. Pitcairn, 2 Conn. 85, 92). "Foreign judgments are never re-examined unless the aid of our courts is asked to carry them

into effect by a direct suit upon the judgment. The foreign judgment is then held to be only prima facie evidence of the demand; but when it comes in collaterally, or the defendant relies upon it under the exceptio rei judicatæ, it is then received as conclusive." Kent, C. J., Smith v. Lewis, 3 Johns. (N. Y.) 157, 169, 3 Am. Dec. 469; Monroe v. Douglas, 4 Sand. Ch. (N. Y.) 126, 181; Williams v. Preston, 3 J. J. Marsh. (Ky.) 600, 20 Am. Dec. 179. Burnham v. Webster, 1 Woodb. & M. (U. S.) 172, Fed. Cas. No. 2,179, appears to be the only American case which questions the conclusiveness of a foreign judgment offered as a defense. The general expressions used by the distinguished author of the opinion in that case, if carried out, would render a foreign judgment of little value, and would, it has been said, "destroy the force and effect of judicial proceedings, and make the judgments of a foreign tribunal, no matter how high its rank, or how binding its decisions, within its own jurisdiction, of little greater effect than the original contract or promise sued upon." McMullen v. Ritchie (C. C.) 41 Fed. 502, 8 L. R. A. 268. But the precise point in the case to which the decision is expressly limited is not in opposition to but in support of the general ground upon which the foreign judgment has been held conclusive. In that case, in answer to a suit upon a promissory note, the defendant offered a judgment in a suit in New Brunswick, in which the plaintiff declared upon the note then in suit, with others, and had judgment only for the others. The plaintiff offered to prove that, before the former case was submitted to the jury, the note then in suit was by agreement withdrawn, and was not submitted to the jury, but by mistake the counts upon this note were not struck from the declaration before judgment. The evidence, if true and admissible, established that the former judgment was not an adjudication as to the note in suit, and the only point in fact decided was that the plaintiff could show what was in fact adjudicated in the former suit. Hohner v. Gratz (C. C.) 50 Fed. 369, is within the general exception that rights under a foreign law will not be enforced to the injury of the citizens of the forum. The subject-matter and the parties in the two suits were different, and the principle of res judicata did not apply. Dunstan v. Higgins, 20 L. R. A. 677, note (s. c. 138 N. Y. 70, 33 N. E. 729, 34 Am. St. Rep. 431).

Both upon reason and all the authorities, it is clear that a plea of former adjudication, except as a merger of a cause of action, is sustained by proof of such adjudication in a foreign as well as a domestic tribunal. The Supreme Court of the United States, by a bare majority, has considered that the effect to be given to a foreign judgment is determined by the treatment given our judgments in the courts of the country whose judgment is under consideration; that courts are required to do, not as justice and reason require, but as they are done by. Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95. But this question does not arise here, because the courts of Ontario hold judgments of courts of the United States conclusive

upon the merits. Ritchie v. McMullen, 159 U. S. 235, 16 Sup. Ct 171, 40 L. Ed. 133; Fowler v. Vail, 27 U. C. C. P. 417, 4 Ont. App 267. The contrary contention of the plaintiffs is founded upon earlier cases based upon a statute (23 Vict. c. 24, § 1) which was repealed by 39 Vict. (1875, 1876) c. 7. Fowler v. Vail, supra.

The effect of a foreign judgment upon the same subject-matter, as establishing the defense of res judicata, is the only question now involved. The tendency of the later American cases seems to be to follow the modern English doctrine as to foreign judgments generally. Rankin v. Goddard, 54 Me. 28, 89 Am. Dec. 718; Id., 55 Me. 389; Fisher v. Fielding, 67 Conn. 91, 34 Atl. 714, 32 L. R A. 236, 52 Am. St. Rep. 270; Lazier v. Westcott, 26 N. Y. 146, 82 Am. Dec. 404; Dunstan v. Higgins, 138 N. Y. 70, 33 N. E. 729, 20 L. R. A. 668, 34 Am. St. Rep. 431; Baker v. Palmer, 83 Ill. 568; Roth v. Roth, 104 Ill. 35, 44 Am. Rep. 81; Hilton v. Guyot, supra; Ritchie v. McMullen, supra; 5 Eng. R. Cas. 746; 1 Freem. Judgm. § 597. To what extent the doctrine of these cases is the law of this state, need not now be determined. It is stated as a fact agreed that the judgment pleaded was upon the merits of the issue presented. The issue presented in that case, as in this, was the defendants' liability for the destruction of the plaintiffs' property. It may be the fact was agreed with a different understanding by one of the parties, at least, as to what was the issue presented by the case. But, regardless of the agreed fact, it is apparent from the facts stated that the judgment was upon the merits, and was an adjudication of the plaintiffs' right to recover the damages claimed in this suit. The plaintiffs were not defeated because the action which they brought was not a legal remedy for the wrong claimed (Kittredge v. Holt, 58 N. H. 191), nor upon the ground that the form of their action was misconceived (Meredith Mechanic Ass'n v. American Twist Drill Co., 67 N. H. 450, 39 Atl. 330), but upon the merits of their claim. The matter upon which they proceeded by their declaration, and which the defendants denied by their plea, was the defendants' liability for the loss complained of. This was the issue. King v. Chase, 15 N. H. 9, 41 Am. Dec. 675; Metcalf v. Gilmore, 63 N. H. 174. The decision of this question, when the same question as to the same goods is again raised, concludes all matters of fact or law which were or might have been proved or urged in support of or against the decision reached. Metcalf v. Gilmore, 63 N. H. 189.

If the plaintiffs, in the exigencies of their case as then presented, and in view of their claim that the question was determined by the Canadian statute, thought it wise not to offer proof of New Hampshire law, they must abide by the result so long as that judgment remains unreversed. If the result was due to accident, mistake, or misfortune, which is not claimed, the proper tribunal in which relief should be sought would seem to be the high court of justice of Ontario. A foreign law will not be given effect when it contravenes some estab-

lished and important policy of the state of the forum, or would involve injustice and injury to the people, of the state whose courts are appealed to. Minor, Confl. Laws, 9; Story, Confl. Laws, § 38. It is urged that the policy of this state does not permit common carriers to release themselves from liability for negligence. Assuming this to be so, it only follows that, in rendering the judgment, a mistake was made as to the law of New Hampshire, which does not detract from the force of the judgment as an adjudication, especially when, as in this case, the court is led into error by the failure of the complaining parties to inform it as to the foreign law. Godard v. Gray, L. R. 6 Q. B. 139, 5 Eng. R. C. 726. A domestic judgment pleaded could not be answered by an averment that it was founded upon a mistaken admission of the parties as to the law. There is no reason why such an averment should avail against a foreign judgment. The plaintiffs are not citizens of this state. The defendants are sued here because found here. Their presence in this state is authorized by law. In a sense, they are citizens here. Public policy, which forbids an application of the principles of comity toward the subjects or laws of a foreign country to the injury of our own citizens, for this reason protects the citizens of the state from repeated suits upon the same matter. A citizen who has been compelled to litigate a matter in a foreign country, and take there the chance of an unfavorable decision, ought not to be again required to litigate the same question at home. A rule of public policy for the protection of the citizen cannot properly be applied to do injustice to him. Upon the question raised as to the validity of the contract releasing the defendants from liability for negligence, no opinion is expressed. The defendants' plea of former adjudication states a defense to this action. Upon the facts stated, they are entitled to judgment.

Judgment for the defendants. All concurred.[38]

[38] CONTINENTAL LAW.—Reciprocity is required in Germany, also, for the recognition of foreign judgments as res judicata. 8 R. G. 385 (Jan. 29, 1883). Contra: France and Italy. Most French courts require an exequatur of the foreign judgment, however. Cass. July 21, 1903 (S. 1903, 1, 449), and note. But not so the Italian courts. Cass. Naples, Dec. 17, 1900 (Monitore 1901, p. 368). But see App. Milan, May 4, 1906 (Clunet, 1906, p. 1233).

See, also, B. Richard, Die exceptio rei judicatæ aus einem ausländischen Urteile nach deutschem Reichsrecht, 3 Niemeyer, 10–48.

CHAPTER V.

DOMICILE.

SECTION 1.—IN GENERAL.

WINANS v. ATTORNEY GENERAL.

(House of Lords, L. R. [1904] App. Cas. 287, 73 L. J. K. B. 613.)

William Louis Winans was born in the United States in 1823. In 1859 he came to England and lived there in various places until his death in 1897. By his will he bequeathed an annuity to a relative, and the question in this appeal was whether he was at his death domiciled in England. If he was, legacy duty was payable; otherwise not. The Attorney General having filed an information against the appellants (who were the executors) to recover the duty, Kennedy and Phillimore, JJ., held that the testator was at his decease domiciled in England and that the duty was payable. This decision was affirmed by the Court of Appeal (Collins, M. R., and Stirling and Mathew, L. JJ.). Hence this appeal.

Lord MACNAGHTEN.[1] My Lords, there is, I think, hardly any branch of law which has been more frequently or more fully discussed in this House in comparatively modern times than the law of domicile. Difficulties have arisen, and difficulties must arise now and then, in coming to a conclusion upon the facts of a particular case. But those difficulties, as Lord Cottenham said, are "much diminished by keeping steadily in view the principle which ought to guide the decision as to the application of the facts."

Domicile of origin, or as it is sometimes called, perhaps less accurately, "domicile of birth," differs from domicile of choice mainly in this—that its character is more enduring, its hold stronger, and less easily shaken off.

In Munro v. Munro (1840) 7 Cl. & F. 876, 51 R. R. 103, Lord Cottenham observed that it was one of the principles adopted, not only by the law of England, but generally by the laws of other countries, "that the domicile of origin must prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile and acquiring another as his sole domicile. * * * Residence alone," he adds, "has

[1] The opinion of the Lord Chancellor and a part of the opinion of Lord Lindley have been omitted.

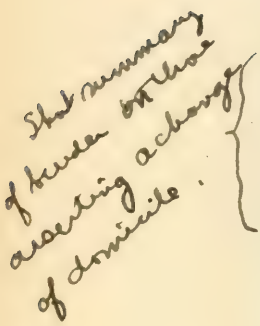
no effect per se, though it may be most important as a ground from which to infer intention." "The law," said Lord Cairns, L. C., in Bell v. Kennedy (1868) L. R. 1 H. L. Sc. 310, "is beyond all doubt clear with regard to the domicile of birth that the personal status indicated by that term clings and adheres to the subject of it until an actual change is made by which the personal status of another domicile is acquired." The onus of proving that a domicile has been chosen in substitution for the domicile of origin lies upon those who assert that the domicile of origin has been lost.

"Residence and domicile," as Lord Westbury points out (L. R. 1 H. L. Sc. 320, at page 321), "are two perfectly distinct things. * * * Although residence may be some small prima facie proof of domicile, it is by no means to be inferred from the fact of residence that domicile results, even although you do not find the party had any other residence in existence or in contemplation." Lord Chelmsford's opinion—Udny v. Udny (1869) L. R. 1 H. L. Sc. 455—was that "in a competition between a domicile of origin and an alleged subsequently acquired domicile there may be circumstances to show that however long a residence may have continued, no intention of acquiring a domicile may have existed at any one moment during the whole of the continuance of such residence. The question in such a case is not whether there is evidence of an intention to retain the domicile of origin, but whether it is proved that there was an intention to acquire another domicile."

Such an intention, I think, is not to be inferred from an attitude of indifference or a disinclination to move increasing with increasing years, least of all from the absence of any manifestation of intention one way or the other. It must be, to quote Lord Westbury again, a "fixed and settled purpose." "And," says his Lordship (L. R. 1 H. L. Sc. 321), "unless you are able to shew that with perfect clearness and satisfaction to yourselves, it follows that a domicile of origin continues." So heavy is the burden cast upon those who seek to show that the domicile of origin has been superseded by a domicile of choice! And rightly, I think. A change of domicile is a serious matter—serious enough when the competition is between two domiciles both within the ambit of one and the same kingdom or country—more serious still when one of the two is altogether foreign. The change may involve far-reaching consequences in regard to succession and distribution and other things which depend on domicile.

To the same effect was the inquiry which Lord Cairns proposed for the consideration of the House in Bell v. Kennedy, L. R. 1 H. L. Sc. 311. It was this: Whether the person whose domicile was in question had "determined" to make, and had, in fact, made the alleged domicile of choice "his home with the intention of establishing himself and his family there, and ending his days in that country"? In a later case, Douglas v. Douglas (1871) L. R. 12 Eq. 645, which came before Wickens, V. C., who was an excellent lawyer,

and owing to the official position which he long held peculiarly conversant with cases of this sort, all the authorities were reviewed. The competition there was between a Scotch domicile of origin and an alleged English domicile of choice. The learned Vice Chancellor thought the case "a peculiar and difficult one." He put the question in this way: "What has to be here considered," he said, "is whether the testator * * * ever actually declared a final and deliberate intention of settling in England, or whether his conduct and declarations lead to the belief that he would have declared such an intention if the necessity of making the election between the countries had arisen."



My Lords, if the authorities I have cited are still law, the question which your Lordships have to consider must, I think, be this: Has it been proved "with perfect clearness and satisfaction to yourselves" that Mr. Winans had at the time of his death formed a "fixed and settled purpose"—"a determination"—"a final and deliberate intention"—to abandon his American domicile and settle in England?

Considering the amount of Mr. Winans' fortune, which was between two and three millions in marketable securities, and the length of his residence in this country, it is somewhat singular that the evidence offered on the question before your Lordships should be so meager. There is not a single letter written by or to him, or a memorandum or note of any sort made by him, which bears directly on the point. There is nothing but long-continued residence in England on the one hand and some oral declarations and some words in some legal documents on the other. There is nothing else except such inference as may be drawn from a consideration of Mr. Winans' character and disposition, the life he led here, and the objects which he seems to have had most at heart.

The principal events in Mr. Winans' life may be stated briefly. He was born in the United States in 1823. He lived there till 1850, residing in Baltimore with his father, a railway contractor, and employed in his father's business. Mr. Winans' eldest son, Walter, who was examined in this case, says that when he spoke of Baltimore he always called it "home." In 1850 Mr. Winans went to Russia. He was employed by the Russian government, as his father had been, in equipping railways there on the American system. During the Crimean War he rendered assistance to the Russian government in the construction and the equipment of gunboats to be used against the enemy—England and England's ally. In Russia he married a Guernsey lady, the daughter of a gentleman also employed by the Russian government. He had two sons by her. In 1859 his health broke down. There were symptoms of consumption, and he was warned by his doctor that another winter in Russia would probably be fatal. He was advised to winter in Brighton in England. Very reluctantly, under medical orders, he left St. Petersburg and spent the winter in

a hotel at Brighton, returning to Russia when the winter was over. In 1860 he took a furnished house in Brighton, No. 2 Chichester Terrace, for a term of five years, determinable at the end of any year. He also took the next house, No. 1, for a term of twenty-one years, determinable at the fifth, seventh, or fourteenth year. He connected the two houses structurally. He held both these houses at the time of his death—the furnished house, No. 2, as tenant from year to year, and No. 1 on a tenancy similar to that on which it was originally taken. From 1860 down to 1870 or 1871 he used to spend the winter at Brighton and about eight months of the year in Russia. In 1870 he gave up his house in St. Petersburg, and took a lease of some shooting in Scotland, apparently for the sake of his sons, for he shot very little himself. From 1871 to 1883 he spent about two months in Russia, two or three months in Kissingen in Germany, and the rest of the year in Brighton, Scotland, or London. In 1883 he ceased to visit Russia, thenceforward dividing his time between Kissingen, Brighton, London, and Scotland. This mode of life continued until 1893. After that date he spent the whole of the year in England—in London, Brighton, and the country. He never bought an estate in England for himself or for either of his sons. As far as he was concerned "he preferred living in furnished houses or hotels" —so his son says.

Two events in his life referred to in the argument have, I think, no bearing on the question before your Lordships. In 1877, to please his wife, he bought the crown lease of a house in Palace Gardens. But he never lived there after 1892. It was shut up, and he tried to dispose of it. When he bought the lease he seems to have made particular inquiries in order to ascertain whether there was anything in the conditions of the lease which might prevent his parting with it at any time he pleased. He never liked to "hamper" himself. Any prudent person would probably have done the same. Then there was his unfortunate experiment in the management and improvement of deer forests in Scotland. He took vast tracts of forest, not, perhaps, altogether for sporting purposes, as sport is understood in this country. After a time he inclosed the ground with miles of fencing to prevent the deer straying. He had a notion that the value of the forest for letting purposes would be much increased by stopping shooting for some years, and allowing the stags a longer term of undisturbed life. However, he got into trouble with the crofters and with his lessors, and he became rather unpopular both with those by whom deerstalking is highly esteemed and those to whom deer forests are an abomination. He thought, too, he had rather wasted money on the shootings; so he gave up his experiment, and he seems to have got rid of all the Scotch shootings before his death.

My Lords, in the dearth of evidence by written or oral declarations as to Mr. Winans' intentions, it seems to me to be important to consider what manner of man Mr. Winans was, what were the main

tests of intention

over.

objects of his existence, and what sort of a life he lived in this country. I think there is a good deal of force in some observations that were made both by Lord Cranworth and Lord Wensleydale in the case of Whicker v. Hume (1858) 7 H. L. C. 124, to the effect that in these days, when the tendency of the educated and leisured classes is to become cosmopolitan—if I may use the word—you must look very narrowly into the nature of a residence suggested as a domicile of choice before you deprive a man of his native domicile.

Mr. Winans was a person of considerable ability and of singular tenacity of purpose, self-centered, and strangely uncommunicative. He was not interested in many things, but whatever he did he did, as his son says, thoroughly. He became completely absorbed in a scheme when he took it up. At the same time he lived a very retired—almost a secluded—life. He took no part in general or municipal politics. He rarely went into society. He had no intimate friends, if, indeed, he had any friends at all, in this country. There is no evidence that he was interested in any charity or charitable or philanthropic institution in England. Although he was on affectionate terms with his two sons, he never let them into his secrets. "He always worked his business himself," his son says, "and never brought us into the business affairs in any way." And although at odd times he mentioned his property in America, he never allowed even his eldest son "to understand much about it."

Mr. Winans had three objects in life. His first object was his health. He nursed and tended it with wonderful devotion. He took his temperature several times a day. He had regular times for taking his temperature, and regular times for taking his various waters and medicines.

Besides the care of his health, there were two other objects which engrossed his thoughts. The first was the construction of spindle-shaped vessels commonly called cigar ships. This form of vessel was, as Mr. Winans asserted, an invention of the Winans family. Many patents were taken out for it both in England and in America. It was claimed that vessels of this type would be able to cross the Atlantic without pitching or rolling. In an application to Congress in the year 1892 Mr. Winans represented himself as attached heart and soul to his country, and asked for protection for a long term of years in consideration of the great expenditure which he and his family had incurred in perfecting the invention, and the vast benefits that would result from it to the people of the United States. Mr. Winans declared his confident expectation that a fleet of spindle-shaped vessels subsidized by Congress would restore to America the carrying trade which had fallen into the hands of England and other foreign nations, secure to America the command of the sea, and make it impossible for Great Britain to maintain war against the United States. Such a fleet as he described in his application could, he said, "meet war vessels in open sea near the European side and destroy one ves-

sel after another, so that none of them would be able to reach our shores." In the development of his invention Mr. Winans stated that he had incurred an expense nearly equal to four millions of dollars.

Mr. Winans' confidence in this project remained unshaken to the end of his life, and he kept an office in Beaufort Gardens where a staff of engineers and draftsmen was engaged in working out the problem.

There was another scheme which Mr. Winans hoped to develop and work in connection with his fleet of spindle-shaped vessels. In 1859 a property in Baltimore, about 200 acres in extent, called Ferry Bar, was purchased on behalf of the Winans family originally for the purpose of being used, as Mr. Winans states in a letter of January 31, 1882, "for the service of the sea-going steamers of the spindle-shaped form." The scheme was that the water frontage should be used for wharves and docks, while a portion of the property should be laid out for the building of first-class houses as a sort of Belgravia. There Mr. Winans intended to build a big house for himself and control the undertaking, which would make the property, he thought, when developed, worth one million sterling. Nothing practical came of this scheme, because the members of the family could not agree among themselves how the property was to be developed. So Mr. Winans determined to wait until he could get the whole into his own hands. Then he would develop the property himself in his own way and according to his own ideas. He did not succeed in acquiring the entire interest until just before his death. At the date of his death, his son says, "he was working night and day on it." I find that in the conveyances of the last portion of the Ferry Bar property, which were prepared just before his death, and which are dated June 16, 1897, Mr. Winans is described as "of city of Baltimore, but now sojourning in the city of London, England."

Of course, to us these schemes of Mr. Winans appear wild, visionary, and chimerical. But I have no doubt that to a man like Mr. Winans, wholly wrapt up in himself, they were very real. They were the dream of his life. For forty years he kept them steadily in view. And one was anti-English and the other wholly American.

It was in connection with these schemes that the latest and clearest declaration of intention was made by Mr. Winans. Mr. H. Montague Williams, who was his solicitor at Brighton, says that about two years before his death—a time which in cross-examination he fixed in the winter of 1895 or beginning of 1896—Mr. Winans entered into rather a lengthy disquisition about the Ferry Bar property. Mr. Winans told him that he was making arrangements for buying the remaining shares in it, that a good deal of it belonged to him, and that he intended when he had done that to go out to America and live in Baltimore and develop the estate there himself. Mr. Williams says he remembers Mr. Winans particularly saying, "If I

do that it will be worth a million pounds;" and he adds, "The decided way in which he said 'I shall go out to Baltimore' (or words to that effect) struck me at the time."

The only other circumstance to be mentioned is that in his will dated February 4, 1897, Mr. Winans describes himself as a "citizen of the United States of America."

It was argued on behalf of the Crown that, although Mr. Winans may have been prevented by the state of his health from returning to America when he left Russia, and although he could not have safely attempted the voyage in the latter years of his life, yet there was a time in which he might have ventured to cross the Atlantic in an ordinary liner. The obvious answer is that at that time, when divided counsels and family disagreements prevented the development of the Ferry Bar property, he had no object in going to Baltimore.

Then it was said that the length of time during which Mr. Winans resided in this country leads to the inference that he must have become content to make this country his home. Length of time is of course a very important element in questions of domicile. An unconscious change may come over a man's mind. If the man goes about and mixes in society that is not an improbable result. But in the case of a person like Mr. Winans, who kept himself to himself and had little or no intercourse with his fellow men, it seems to me that at the end of any space of time, however long, his mind would probably be in the state it was at the beginning. When he came to this country he was a sojourner and a stranger, and he was, I think, a sojourner and a stranger in it when he died.

On the whole I am unable to come to the conclusion that Mr. Winans ever formed a fixed and settled purpose of abandoning his American domicile and settling finally in England. I think up to the very last he had an expectation or hope of returning to America and seeing his grand schemes inaugurated. To take the test proposed by Wickens, V. C., "if the question had arisen in a form requiring a deliberate or solemn determination," I have no doubt Mr. Winans, who was, as his son says, "entirely American in all his ideas and sympathies," would have answered it in favour of America.

I am therefore of opinion that the Crown has not discharged the onus cast upon it, and I think that the order appealed from ought to be reversed.

Lord LINDLEY. * * * My Lords, I take it to be clearly settled —by the Lauderdale Peerage Case (1885) 10 App. Cas. 692; Udny v. Udny, L. R. 1 H. L. Sc. 441; Bell v. Kennedy, L. R. 1 H. L. Sc. 307— that the burden of proof in all inquiries of this nature lies upon those who assert that a domicile of origin has been lost, and that some other domicile has been acquired. Further, I take it to be clearly settled that no person who is sui juris can change his domicile without a physical change of place, coupled with an intention to adopt the place to which he goes as his home or fixed abode or permanent residence,

whichever expression may be preferred. If a change of residence is proved, the intention necessary to establish a change of domicile is an intention to adopt the second residence as home, or, in other words an intention to remain without any intention of further change except possibly for some temporary purpose. See Story's Conflict of Laws, § 43, and In re Craignish [1892] 3 Ch., at page 192, Attorney General v. Pottinger (1861) 6 H. & N. 733, and Douglas v. Douglas, L. R. 12 Eq. 643, 644.

My Lords, the change of residence here is plain enough, and need not be enlarged upon. The difficulty is about the intention of Mr. Winans with reference to the change. The exact time when he made up his mind to settle here cannot be ascertained. There is no document or conversation which enables any one to fix the date. But it by no means follows that when he died it cannot be inferred that he must have abandoned all thoughts of going back to America and settling there, and have gradually become content to make his home in this country without contemplating any change. If this can be established, a change of domicile will be the legal result. Haldane v. Eckford (1869) L. R. 8 Eq. 631; Douglas v. Douglas, L. R. 12 Eq. 617. An intention to change nationality, to cease to be an American and to become an Englishman, was said to be necessary in Moorehouse v. Lord (1863) 10 H. L. C. 272; but that view was decided to be incorrect in Udny v. Udny, L. R. 1 H. L. Sc. 441.

Intention may be inferred from conduct, and there are cases in which domicile has been changed, notwithstanding a clear statement that no change of domicile was intended. See Re Steer (1858) 3 H. & N. 599, and per Wickens, V. C., in 12 Eq. 644. An expressed intention to return for a temporary purpose, or in some possible event which never happens, will not prevail over a clear inference from other circumstances of an intention to remain. See Attorney General v. Pottinger, 6 H. & N. 747, per Bramwell, B., and Doucet v. Geoghegan (1878) 9 Ch. D. 441.

My Lords, I do not propose to refer at length to the details of Mr. Winans' life. They were elaborately brought to your Lordships' attention by counsel, and have been most graphically described by my noble and learned friend who has just addressed the House. There is no real controversy about the facts. The question is what inference ought to be drawn from them. Here I have the misfortune to differ from my noble and learned friends who have just addressed the House. I have arrived at the same conclusion as that arrived at by Phillimore, J., and the Court of Appeal. I cannot myself draw any other inference than that which they have drawn: Where was Mr. Winans' home—his settled permanent home? He had one and only one, and that one was in this country; and long before he died I am satisfied that he had given up all serious idea of returning to his native country. He was an American citizen permanently settled in this country. But although so settled he was proud of his nationality

and had no intention to change it. He may at one time have looked back on Baltimore as his possible ultimate home, but he had ceased to do so long before he died. In 1880 he proposed to build a house for himself in Baltimore; but this came to nothing, and none of his later schemes for developing his property there were carried out in his lifetime, nor did they involve any change of residence on his part. A dim hope and expectation of being at some time able to return to America when he had succeeded in constructing a ship to his liking—which he never did—is spoken to by his son, but when last does not appear. I can find nothing to displace the only inference which I can draw from Mr. Winans' conduct for the last twenty or twenty-five years of his life.

In my opinion the appeal should be dismissed with costs.

Orders of the Court of Appeal and Queen's Bench Division reversed with costs here and below; the respondent to repay to the appellants the amount of the legacy duty paid by them. Cause remitted to the King's Bench Division.[2]

WHITE v. TENNANT.

(Supreme Court of Appeals of West Virginia, 1888. 31 W. Va. 790, 8 S. E. 596. 13 Am. St. Rep. 896.)

SNYDER, J. This is a suit brought December, 1886, in the circuit court of Monongalia county by William L. White and others against Emrod Tennant, administrator of Michael White, deceased, and Lucinda White, the widow of said Michael White, to set aside the settlement and distribution made by the administrator of the personal estate of said decedent, and to have the same settled and distributed according to the laws of the state of Pennsylvania, which state it is claimed was the domicile of said decedent at the time of his death. The plaintiffs are the brothers and sisters of the decedent, who died in this state intestate. On October 28, 1887, the court entered a decree dismissing the plaintiffs' bill, and they have appealed.

The sole question presented for our determination is whether the said Michael White, at the time of his death, in May, 1885, had his legal domicile in this state or in the state of Pennsylvania. It is admitted to be the settled law that the law of the state in which the decedent had his domicile at the time of his death will control the succession and distribution of his personal estate. Before referring to the facts proved in this cause, we shall endeavor to determine what in law is meant by "domicile." Dr. Wharton says: "'Domicile' is a residence acquired as a final abode. To constitute it there must be

[2] The Lord Chancellor (Earl of Halsbury) was unable to come to a satisfactory conclusion either way, and decided for reversal on the ground that the burden of proof was upon the Crown.

(1) residence, actual or inchoate; (2) the nonexistence of any intention to make a domicile elsewhere." Whart. Confl. Law, § 21. "'Domicile' is that place or country, either (1) in which a person in fact resides with an intention of residence—animus manendi; or (2) in which, having so resided, he continues actually to reside, though no longer retaining the intention of residence—animus manendi; or (3) with regard to which, having so resided there, he retains the intention of residence—animus manendi—though he in fact no longer resides there." Dicey, Dom. 44. Two things must concur to establish domicile—the fact of residence, and the intention of remaining. These two must exist, or must have existed, in combination. There must have been an actual residence. The character of the residence is of no importance; and, if domicile has once existed, mere temporary absence will not destroy it, however long continued. Munro v. Munro, 7 Clark & F. 842. The original domicile continues until it is fairly changed for another. It is a legal maxim that every person must have a domicile somewhere; and he can have but one at a time for the same purpose. From this it follows that one cannot be lost or extinguished until another is acquired. Baird v. Byrne, 3 Wall. Jr. (U. S.) 1, Fed. Cas. No. 757. When one domicile is definitely abandoned, and a new one selected and entered upon, length of time is not important; one day will be sufficient, provided the animus exists. Even when the point of destination is not reached, domicile may shift in itinere, if the abandonment of the old domicile, and the setting out for the new, are plainly shown. Munroe v. Douglas, 5 Madd. 405. Thus a constructive residence seems to be sufficient to give domicile, though an actual residence may not have begun. Whart. Confl. Law, § 58. A change of domicile does not depend so much upon the intention to remain in the new place for a definite or an indefinite period, as upon its being without an intention to return. An intention to return, however, at a remote or indefinite period, to the former place of actual residence, will not control, if the other facts which constitute domicile all give the new residence the character of a permanent home or place of abode. The intention and actual fact of residence must concur, where such residence is not in its nature temporary. Hallet v. Bassett, 100 Mass. 170, 171; Long v. Ryan, 30 Grat. (Va.) 718. In Bradley v. Lowry, 1 Speer, Eq. (S. C.) 1, 39 Am. Dec. 142, it is held that "change of domicile is consummated when one leaves the state where he has hitherto resided, avowing his intention not to return, and enters another state intending to permanently settle there." A domicile once acquired remains until a new one is acquired elsewhere, facto et animo. Story, Confl. Law, § 47; Hart v. Lindsey, 17 N. H. 235, 43 Am. Dec. 597. Where a person removes from one state to another and establishes a fixed residence in the latter, it will become his domicile, although there may be a floating intention to return to his former place of abode at some future period. Ringgold v. Barley, 5 Md. 186, 59 Am. Dec. 107. "If a man intending to

remove with his family visits the place of removal beforehand, to make arrangements, or even sleeps there occasionally for convenience, and then transfers his family, the change of domicile takes effect from the time of removing with the family; but if he has definitely changed his residence, and taken up his abode permanently in a new place, the fact that his family remains behind until he can remove them conveniently, and that he visits them occasionally, will not prevent the new place being his domicile." Guier v. O'Daniel, 1 Am. Lead. Cas. (753) 902; Cambridge v. Charlestown, 13 Mass. 501.

The material facts in the case at bar are as follows: Joseph S. White, the father of the plaintiffs and Michael White, died intestate in Monongalia county, seised of a tract of about 240 acres of land, of which about 400 acres lay in Greene county, Pa.; the whole constituting but one tract or farm. The mansion house in which the father resided was located on the West Virginia side of the farm, and there was also a dwelling house generally occupied by tenants on the Pennsylvania part of the farm. After the death of the father, his widow and the plaintiffs remained together and occupied the home farm, residing in the mansion house in West Virginia. Michael White, several years before his death, married the defendant Lucinda White, a daughter of the defendant Emrod Tennant, and about that time purchased a farm on Day's Run, in Monongalia county, some 15 miles from the home place, to which he moved, and at which he and his wife resided. It is conceded that Michael was born and had his domicile in West Virginia all his life, until about April 1, 1885. In the winter of 1884–85, Michael sold his Day's Run farm, and then rented or made an arrangement with his mother and brothers and sisters, the plaintiffs, to occupy the 40 acres of the home farm, in which he still had an undivided interest, and to live in the house on said 40 acres in Greene county, Pa. He was to give to the purchaser the possession of his Day's Run farm on April 1, 1885, and to have possession of the Pennsylvania house and 40 acres at the same time. In March, 1885, he moved part of his household goods into the Pennsylvania house, and put them into one of the rooms by permission of the tenant who then occupied it, and who did not vacate it until between the middle and last of March, 1885. About the same time he moved an organ and some grain to the old homestead, until he could get possession of the Pennsylvania house. On the morning of April 2, 1885, he finally left the Day's Run house with the remainder of his goods and his wife, he having no children, with the declared intent and purpose of making the Pennsylvania house his home that evening. He, with his team, wife, and goods, and live stock, passed into the state of Pennsylvania several miles before he reached said house, and continued in said state thence to said Pennsylvania house, where they arrived that evening about sundown, and then and there unloaded their goods, and put them in the house, setting up one bed, and turning the fowls and other live stock loose at the house.

The said house had been vacated for several days. It was a damp, cool day, and the house was found to be damp and uncomfortable. The wife was complaining of feeling unwell, and in consequence of that fact and the uncomfortable condition of the house, on the invitation of her brother-in-law and others of the family who then resided at the mansion house, but a short distance therefrom, the said Michael and his wife went to the mansion house in West Virginia to stay all night and return in the morning. Before leaving the Pennsylvania house the wife had gotten out of the buggy at the house, and the said Michael, after putting into it his household goods, locked the door, and took the key with him. On the following morning, the wife still feeling unwell, and the brother, who was to return the team which they had used in moving their goods, having taken sick, the wife, after going to the Pennsylvania house to milk, returned to the mansion house, and Michael took the team back to Day's Run. On the return of Michael from this trip he found his wife so sick with typhoid fever that it was impossible to move her, in consequence of which both he and she remained at the mansion house—she because she was unable to get away, and he to wait on her—but he went daily over to the Pennsylvania house to look after it, and to feed his stock there, calling it his "home." In 10 or 15 days, and before the wife had sufficiently recovered to leave her bed, Michael was attacked with typhoid fever, and about 10 days thereafter died intestate in the same house. The wife recovered, and the defendant Emrod Tennant, her father, administered on the estate of Michael, taking out letters of administration in Monongalia county, W. Va. The administrator settled his accounts before a commissioner of said county, and distributed the estate according to the laws of West Virginia; that is, by paying over to the widow the whole personal estate remaining after the payment of the debts of the decedent. It is admitted that if the distribution had been according to the laws of the state of Pennsylvania the wife would have been entitled to the one half only of said estate, and the plaintiffs would have been entitled to the other half. As the law of the state in which the decedent had his domicile at the time of his death must govern the distribution of his estate, the important question is, where, according to the foregoing facts, was the domicile of Michael at the time of his death? It is unquestionable that prior to the 2d day of April, 1885, his domicile was and had always been in the state of West Virginia. Did he on that day, or at any subsequent day, change his domicile to the state of Pennsylvania? According to the authorities hereinbefore cited, if it is shown that a person has entirely abandoned his former domicile in one state with the intention of making his home at a fixed place in another state, with no intention of returning to his former domicile, and then establishes a residence in the new place for any period of time, however brief, that will be in law a change of domicile, and the latter will remain his domicile until changed in like manner. The facts in this case conclusively prove that Michael White, the decedent,

abandoned his residence in West Virginia with the intention and purpose not only of not returning to it, but for the expressed purpose of making a fixed place in the state of Pennsylvania his home for an indefinite time. This fact is shown by all the circumstances, as well as by his declarations and acts. He had sold his residence in West Virginia, and surrendered its possession to the purchaser, and thereby made it impossible for him to return to it and make it his home. He rented a dwelling in Pennsylvania, for which he had no use except to live in, and make it his home. In addition to all this, he had moved a part of his household goods into this house, and then on the 2d of April, 1885, he, with his family and the remainder of his goods and stock, finally left his former home, and the state of West Virginia, and moved into the state of Pennsylvania, to his house in that state, and there put his goods in the house, and turned his stock loose on the premises. At the time he left his former home on that morning, and while he was on the way to his new home, his declared purpose and intention were to make that his home from that very day, and to occupy it that night. He arrived in Pennsylvania and at his new home with that intention; and it was only after he arrived there, and for reasons not before known, and which had no effect to change his purpose of making that his future home, that he failed to remain there from that time. There was no change in his purpose except that after he arrived at his new home, and unloaded and left his property there, he concluded, on account of the condition of the house and the illness of his wife, that it would be better to go with his wife to remain one night with his relatives, and return the next morning. When he left his former home, without any intention of returning, and in pursuance of that intention did in fact move with his family and effects to his new home with the intention of making it his residence for an indefinite time, it is my opinion that when he and his wife arrived at his new home it became eo instanti his domicile, and that his leaving there, under the circumstances with the intention of returning the next day did not change the fact. The concurrence of his intention to make the Pennsylvania house his permanent residence with the fact that he had actually abandoned his former residence, and moved to and put his goods in the new one, made the latter his domicile. According to the authorities hereinbefore referred to he must of necessity have had a domicile somewhere. If he did not have one in Pennsylvania, where did he have one? The fact that he left the Pennsylvania house after he had moved to it with his family and goods, to spend the night, did not revive his domicile at his former residence on Day's Run, because he had sold that, and left it without any purpose of returning there. By going from his new home to the house of his relatives to spend the night he certainly did not make the house thus visited his domicile; therefore, unless the Pennsylvania house was, on the evening of April 2, 1885, his domicile, he was in the anomalous position of being without a domicile anywhere, which, as we have seen, is a legal impossibility;

and that house having become his domicile, there is nothing in this case to show that he ever did in fact change or intend to change it, or to establish a domicile elsewhere.

It follows, therefore, that that house remained his domicile up to and at the time of his death; and, that house being in the state of Pennsylvania, the laws of that state must control the distribution of his personal estate, notwithstanding the fact that he died in the state of West Virginia. For these reasons the decree of the circuit court must be reversed, and the cause must be remanded to that court to be there further proceeded in according to the principles announced in this opinion, and the rules of courts of equity.[8]

Appeal of HINDMAN.

(Supreme Court of Pennsylvania, 1877, 1878. 85 Pa. 466.)

MERCUR, J. All the assignments of error relate to the question of the place of George Hindman's domicile, at the time of his death. They will therefore be considered together. Vattel defined domicile to be a fixed residence, with an intention of always staying there. This definition is too limited to apply to the migratory habits of the people of this country. So narrow a construction would deprive a large proportion of our people of any domicile. The better definition is, that place in which a person has fixed his habitation, without any present

[8] "It is probably not necessary that, in order to work a change of domicile from one state or country to another, the person whose domicile is in question should reach the particular spot within the territorial limits of the latter at which he intends fixing his permanent abode; and indeed it may perhaps be said that it is not absolutely necessary for such purpose that the person should ever have, either in fact or in contemplation, a permanent home within any particular municipal division of such state or country. Such cases must necessarily be rare, but it is possible to conceive of a Frenchman, for example, coming to England with the intention of permanently remaining there, but without ever fixing a permanent abode in any particular part of that country. In such case, while it would doubtless be much more difficult to prove the requisite intention than if he had, for example, purchased a dwelling house and fixed himself in it in an apparently permanent manner, yet, assuming the requisite intention to be made out by other proofs, there is little doubt that his domicile would be held to be changed." Jacobs on Domicile, § 133. Accord: Marks v. Marks (C. C.) 75 Fed. 321 (1896). Contra: Cooper v. Beers, 143 Ill. 25, 33 N. E. 61 (1892). See, also, Arnott v. Groom, (1846), 9 Dunlop, 142; In re Patience (1885), L. R. 29 Ch. D. 976; Dicey, Conflict of Laws, 93–96.

As to municipal domicile, where the boundary line passes through the dwelling house, see Abington v. North Bridgewater, 23 Pick. (Mass.) 170 (1839); East Montpelier v. City of Barre, 79 Vt. 542, 66 Atl. 100 (1906).

It has been held that a shipmaster may acquire a domicile without actual presence by sending his wife to a state with the intent to make it his home. Bangs v. Brewster, 111 Mass. 382 (1873). But see Hart v. Horn, 4 Kan. 232 (1867).

A party may have a separate "commercial domicile" which is based upon mere residence. It is of importance in case of war to determine whether a person is an alien enemy. See Dicey, Conflict of Laws, 740–745.

intention of removing therefrom. 1 Bouv. Law Dic. 499; Story's Confl. of Laws, § 43; Putnam v. Johnson, 10 Mass. 488; Greene v. Windham, 13 Me. 225; Appeal of Carey, 75 Pa. 201.

The evidence in this case shows that George Hindman was born in Brooke county, West Virginia, where he resided till 1869. Then he moved on a farm which he had purchased in Hancock county, of the same state. There he resided until March, 1871. He then sold his farm, which was all the real estate he owned, and went to live with his brother-in-law, McClurg, in Washington county, Pennsylvania. He never married, and had no family. His property was all in personal estate. He took with him a horse, a box containing his notes, bonds and valuable papers. Soon afterwards he brought his other horse to McClurg's leaving in Virginia only some farming implements of little value. He continued to live with McClurg, paying his board, and there made his home until April, 1872. He then went to live with Gibson, another brother-in-law, in Washington county, taking with him his box, a bureau, clock and table. There he continued to live until the time of his death, 22d June, 1872. All these facts appear by the evidence and by the auditor's report, and are uncontradicted. Although he thus resided, and made his home in this state for about fifteen months, and died here, yet the auditor and court below, found that he was domiciled in West Virginia at the time of his death. They appear to have reached this conclusion, from his declarations made while he was residing in Pennsylvania.

The evidence shows that after he thus removed from West Virginia, he at different times made visits to friends in that state, yet he always returned to the room which he retained at the house of his brother-in-law in Pennsylvania. Here was his property and his home. He had no house, no residence, no property, no family in the state from which he had moved. When he sold the farm on which he had lived, he gave up possession and removed therefrom. He thereby gave up that domicile. He then made no new abode, and established no other residence in that state. He gathered up his property, and with it departed, and located in another state. This unequivocal act of moving from the state and taking up his residence in another state, is very strong evidence of the establishment of a domicile in the latter. Its effect is not destroyed by his expressed and indefinite intention to go back into West Virginia at some future time and there buy land. Nothing less than a present intention to retain his domicile there would prevent its transfer to the state into which he moved. He did not come into Pennsylvania for his health, or as a traveller, nor for any other particular business of a temporary nature. No person can have more than one domicile at the same time in regard to succession to personal property. Abington v. North Bridgewater, 23 Pick. (Mass.) 170.

It is true that a domicile once gained remains until a new one is actually acquired, facto et animo. Story on Conflict of Laws, § 47, The fact and intention must concur, yet the former may prove the

latter. A mere intention to remove permanently, without an actual removal, works no change of domicile; nor does a mere removal from the state, without an intention to reside elsewhere. But when a person sells all his land, gives up all his business in the state in which he had lived, takes his movable property with him and establishes his home in another state, such acts prima facie prove a change of domicile. Vague and uncertain evidence cannot remove the legal presumption thus created. Story on Conflict of Laws, § 46; Wilbraham v. Ludlow, 99 Mass. 587; Harris v. Firth, 4 Cranch, C. C. (U. S.) 710, Fed. Cas. No. 6,120.

The evidence of Hindman's declarations shows he had a fickle and uncertain mind. Sometimes he expressed an intention to buy a farm in Brooke county, at other times, in Hancock county, then in Washington county; sometimes complaining of the collateral inheritance tax of Pennsylvania, and declaring that he did not want to become a citizen of this state, but would go back and make Virginia his home, and that he never intended to pay any tax in this state. He refused to be assessed or registered, and did not vote in Pennsylvania. It, however, does not appear after he moved here, that he was either assessed or registered in West Virginia, or voted there. Soon after paying his taxes, the 1st of November 1871, assessed against him in Virginia prior to his sale, he said to Gardner it was the last tax he ever expected to pay in Virginia, and soon thereafter declared he did not want land, as he could do better with his money than by farming. Again, in January, 1872, he said to Samuel Hindman that he wanted no more land, and would make his home in Pennsylvania. After this he again talked of buying land in Virginia. Without giving more of the evidence in detail, the whole of it tends to show that he gave up his domicile in West Virginia and acquired one in Pennsylvania; that at first he intended to purchase a farm, and wherever that should be, to go and reside on it. While he talked of purchasing in each state, yet his preference appeared to be in favor of one in Virginia. He seems to have avoided all assessments and all taxes everywhere, for the time he lived in Pennsylvania. He made no purchase anywhere. As time ran on he became less desirous of purchasing land. During the last two or three months of his life, he made no mention of land. As he had only indicated an intention of returning to Virginia in connection with his purchasing land there, when he ceased to talk about the purchase of land he said no more about returning to Virginia. It was said in Abington v. North Bridgewater, supra, "it depends not upon proving particular facts, but whether all the facts and circumstances taken together, tending to show that a man has his home or domicile in one place, overbalance all the like proofs tending to establish it in another."

Applying this rule, which we believe a correct one, we think all the facts and circumstances proved clearly preponderate in favor of his domicile in Pennsylvania. The conclusion to which we have ar-

rived, must not be understood as changing the rule in regard to the force to be given to an auditor's finding of facts. When he reports facts directly proved by the witnesses, his report is entitled to great weight. But when the fact is simply a deduction from other facts reported by him, his conclusion is the result of reasoning, the correctness of which we are as competent to judge as he. We will therefore review such result, and correct it if we discover error therein. Phillips' Appeal, 68 Pa. 130; Moyer's Appeal, 77 Pa. 482.

The learned judge erred in the effect he gave to the declarations, followed by no corresponding action changing the domicile. The distribution must be made according to the intestate laws of Pennsylvania.

Decree reversed and record remanded with instructions to decree distribution conformably with this opinion.[4]

REED'S WILL.

(Supreme Court of Oregon, 1906. 48 Or. 500, 87 Pac. 763, 9 L. R. A. [N. S.] 1159.)

BEAN, C. J.[5] * * * The animus or intent is, therefore, as essential to a change of domicile as the fact of residence. To lose a domicile when once acquired, there must be an intention to do so. A mere change of the place of abode, however long continued, is not sufficient, unless the proper animus or intention is present. This intention, it is true, may be inferred from circumstances, and the residence may be of such a character and accompanied by such indices of a permanent home that the law will apply to the facts a result contrary to the actual intention of the party. Thus one cannot make a permanent fixed commercial residence with all the surroundings of a permanent home in one place and a domicile in another by a mere mental act. But a residence for mere pleasure or health is not regarded as of any great weight in determining the question of a change of domicile, for, in such case it is just as likely that the party intends to retain as to abandon his present domicile. The books abound in cases where absences for 20, 30, and even 40 years effect no change of domicile. White v. Brown, 1 Wall. C. C. (U. S.) 217, Fed. Cas. No. 17,538; Re Domingo Capdevielle, 10 Jur. 1155; Jopp v. Wood, 4 De G. J. & S. 616; Hodgson v. Beauchesne, 12 P. C. 285; Cruger v. Phelps, 21 Misc. Rep. 252, 47 N. Y. Supp. 61. And Sir John Dodson says

[4] "Where a person has either no fixed place of residence, or has two homes, and the scale is almost evenly balanced between them, the legal presumption is in favor of what is called 'domicile of origin,' by which is meant, not the place where he may chance to have been born, but the home of his parents." Comegys, C. J., in Prettyman v. Conaway, 9 Houst. (Del.) 221, 32 Atl. 151 (1891).

[5] A part of the opinion only is given.

in Bremer v. Freeman, 10 Moore, P. C. 306: "A person may live 50 years in a place, and not acquire a domicile, for he may have had all the time an intention to return to his own country." And Mr. Jacobs says: "Residence of itself, although decisive of the factum necessary for a change of domicile, is decisive of nothing further, and even when long continued, although per se evidence of intention, will not supply its place. * * * Intention must concur with fact, and must clearly appear. On the one hand, the shortest residence is sufficient if the requisite animus be present, and, on the other, the longest will not suffice if it be absent." Jacobs, Domicile, § 136.

The residence of Mr. and Mrs. Reed at Pasadena admittedly was for health and pleasure, and not business. It was, therefore, not of that permanent commercial or business character which will in law constitute a change of domicile regardless of the intention of the parties. Nor was it of such a character as will overcome the presumption that their former domicile at Portland continued. We must, therefore, look to the evidence to ascertain whether in fact they intended to abandon their Portland domicile and acquire a new one in California, and in doing so it is important to bear in mind their situation at the time of their removal, the causes which prompted it, its purpose and the place to which they removed. Mr. Reed was in failing health and had been compelled to cease active participation in his business affairs. It was necessary, as he thought, and as he was advised by his physicians, to seek a more congenial climate than that of Oregon. For this purpose he visited California, and, after examining several places or localities, finally selected Pasadena, which, as one of the witnesses testified is "a health resort." A large part of its population "come there and away again"; "two-thirds of it was temporary." "The temporary class is composed largely of people who come in search of health." To this character of a location Mr. and Mrs. Reed moved, because its climatic conditions and general surroundings would, it was thought, conduce to their personal comfort and the improvement of Mr Reed's health. They did not make any investments in Pasadena except such as seemed to them necessary for their comfort and pleasure. Mr. Reed did not dispose of his Portland property, or make any change in his business affairs. He retained his office and bank account in Portland, and his entire conduct negatives an intention to abandon his Portland domicile or to acquire another. Mr. Reed's health did not improve, and he died in 1895, devising and bequeathing his property to his wife. Mrs. Reed continued to reside in Pasadena as before, without making any change in her business affairs or indicating in any way a purpose to change her domicile. She continued her church connection in Portland, making regular contributions for its support and to its charities. She described herself in numerous documents and in her will as a resident of Portland temporarily residing at Pasadena, and the very terms of the will itself indicate that she considered Portland as her home, and entitled to receive her

charitable bequests. The acts of Mr. and Mrs. Reed and the undisputed facts surrounding and characterizing their removal from Portland to California, and their subsequent residence in Pasadena, show to our minds quite clearly that they at all times deemed and considered their residence there as temporary rather than permanent, and that Portland was their legal domicile. The decided weight of the testimony as to their purposes as declared by them is to the same effect. * * *[6]

UDNY v. UDNY.

(House of Lords, 1869. L. R. 1 H. L. [Sc.] 441.)

The late Colonel John Robert Fullerton Udny, of Udny, in the county of Aberdeen, though born at Leghorn, where his father was consul, had by paternity his domicile in Scotland. At the age of fifteen, in the year 1794, he was sent to Edinburgh, where he remained for three years. In 1797 he became an officer in the Guards. In 1802 he succeeded to the family estate. In 1812 he married Miss Emily Fitzhugh, retired from the army, and took upon lease a house in London, where he resided for thirty-two years, paying occasional visits to Aberdeenshire.

In 1844, having got into pecuniary difficulties, he broke up his establishment in London and repaired to Boulogne, where he remained for nine years, occasionally, as before, visiting Scotland. In 1846 his wife died, leaving the only child of her marriage, a son, who, in 1859, died a bachelor.

Some time after the death of his wife Colonel Udny formed at Boulogne a connection with Miss Ann Allat, which resulted in the birth at Camberwell, in Surrey, on the 9th of May, 1853, of a son, the

[6] See Dicey, Conflict of Laws, 149–153.

"'Residence' is the favorite term employed by the American legislator to express the connection between person and place, its exact signification being left to construction, to be determined from the context and the apparent object sought to be attained by the enactment. It is to be regretted that these lights are often very feeble, and that not a little confusion has been introduced into our jurisprudence by the different views held by different courts with regard to the exact force of this and similar words when applied to substantially the same subject-matter. 'Residence,' when used in statutes, is generally construed to mean 'domicile.' In fact, the great bulk of the cases of domicile reported in the American books are cases of statutory residence. This is especially true with regard to the subjects of voting, eligibility to office, taxation, jurisdiction in divorce, probate, and administration, etc. With respect to these subjects there is substantial unanimity in this country in holding statutory residence to mean domicile. In cases of pauper settlement, limitations, etc., there is much conflict of opinion, and in those of attachment the weight of authority is the other way." Jacobs on Domicile, § 75.

Statutory inhabitancy is often held to be equivalent to domicile. Otis v. City of Boston, 12 Cush. (Mass.) 44 (1853); Harvard College v. Gore, 5 Pick. (Mass.) 370 (1827); Borland v. City of Boston, 132 Mass. 89, 42 Am. Rep. 424 (1882); Jacobs on Domicile, § 76.

above respondent, whose parents were undoubtedly unmarried when he came into the world. They were, however, united afterwards in holy matrimony at Ormiston, in Scotland, on the 2d of January, 1854, and the question was whether the respondent, under the circumstances of the case, had become legitimate per subsequens matrimonium.

The Court of Session (First Division) on the 14th of December, 1866 (3d Series, vol. 5, p. 164), decided that Colonel Udny's domicile of origin was Scotch, and that he had never altered or lost it, notwithstanding his long absence from Scotland. They therefore found that his son, the respondent, "though illegitimate at his birth, was legitimated by the subsequent marriage of his parents." Hence this appeal, which the House regarded as involving questions of greatly more than ordinary importance.

Lord WESTBURY.[7] The law of England, and of almost all civilized countries, ascribes to each individual at his birth two distinct legal states or conditions; one by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political status; another, by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil status or condition of the individual, and may be quite different from his political status. The political status may depend on different laws in different countries; whereas the civil status is governed universally by one single principle, namely, that of domicile, which is the criterion established by law for the purpose of determining civil status. For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy, or intestacy, must depend. International law depends on rules which, being in great measure derived from the Roman law, are common to the jurisprudence of all civilized nations. It is a settled principle that no man shall be without a domicile, and to secure this result the law attributes to every individual as soon as he is born the domicile of his father, if the child be legitimate, and the domicile of the mother if illegitimate. This has been called the domicile of origin, and is involuntary. Other domiciles, including domicile by operation of law, as on marriage, are domiciles of choice. For as soon as an individual is sui juris it is competent to him to elect and assume another domicile the continuance of which depends upon his will and act. When another domicile is put on, the domicile of origin is for that purpose relinquished, and remains in abeyance during the continuance of the domicile of choice; but as the domicile of origin is the creature of law, and independent of the will of the party, it would be inconsistent with the principles on which it is by law created and ascribed, to suppose that it is capable of being by the act of the party

New Rule: A man loses a domicile without acquiring another; the domicile of origin revives.

[7] The concurring opinions of the Lord Chancellor, Lord Chelmsford, and Lord Colonsay have been omitted.

entirely obliterated and extinguished. It revives and exists whenever there is no other domicile, and it does not require to be regained or reconstituted animo et facto, in the manner which is necessary for the acquisition of a domicile of choice.

Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicile, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation. It is true that residence originally temporary, or intended for a limited period, may afterwards become general and unlimited, and in such a case so soon as the change of purpose, or animus manendi, can be inferred the fact of domicile is established.

The domicile of origin may be extinguished by act of law, as, for example, by sentence of death or exile for life, which puts an end to the status civilis of the criminal; but it cannot be destroyed by the will and act of the party.

Domicile of choice, as it is gained animo et facto, so it may be put an end to in the same manner. Expressions are found in some books, and in one or two cases, that the first or existing domicile remains until another is acquired. This is true if applied to the domicile of origin, but cannot be true if such general words were intended (which is not probable) to convey the conclusion that a domicile of choice, though unequivocally relinquished and abandoned, clings, in despite of his will and acts, to the party, until another domicile has animo et facto been acquired. The cases to which I have referred are, in my opinion, met and controlled by other decisions. A natural-born Englishman may, if he domiciles himself in Holland, acquire and have the status civilis of a Dutchman, which is of course ascribed to him in respect of his settled abode in the land, but if he breaks up his establishment, sells his house and furniture, discharges his servants, and quits Holland, declaring that he will never return to it again, and taking with him his wife and children, for the purpose of travelling in France or Italy in search of another place of residence, is it meant to be said that he carries his Dutch domicile, that is, his Dutch citizenship, at his back, and that it clings to him pertinaciously until he has finally set up his tabernacle in another country? Such a conclusion would be absurd; but there is no absurdity and, on the contrary, much reason, in holding that an acquired domicile may be effectually abandoned by unequivocal intention and act; and that when it is so determined the domicile of origin revives until a new domicile of choice be acquired. According to the dicta in the books and cases referred to, if the

Englishman whose case we have been supposing lived for twenty years after he had finally quitted Holland, without acquiring a new domicile, and afterwards died intestate, his personal estate would be administered according to the law of Holland, and not according to that of his native country. This is an irrational consequence of the supposed rule. But when a proposition supposed to be authorized by one or more decisions involves absurd results, there is a great reason for believing that no such rule was intended to be laid down.

In Mr. Justice Story's Conflict of Laws (the last edition) it is stated "that the moment the foreign domicile (that is the domicile of choice) is abandoned, the native domicile or domicile of origin is re-acquired."

And such appears to be the just conclusion from several decided cases, as well as from the principles of the law of domicile.

In adverting to Mr. Justice Story's work, I am obliged to dissent from a conclusion stated in the last edition of that useful book, and which is thus expressed: "The result of the more recent English cases seems to be, that for a change of national domicile there must be a definite and effectual change of nationality." In support of this proposition the editor refers to some words which appear to have fallen from a noble and learned lord in addressing this House in the case of Moorehouse v. Lord, 10 H. L. C. 272, when in speaking of the acquisition of a French domicile, Lord Kingsdown says: "A man must intend to become a Frenchman instead of an Englishman."

These words are likely to mislead, if they were intended to signify that for a change of domicile there must be a change of nationality, that is, of natural allegiance.

That would be to confound the political and civil status of an individual, and to destroy the difference between patria and domicilium.

The application of these general rules to the circumstances of the present case is very simple. I concur with my noble and learned friend that the father of Colonel Udny, the consul at Leghorn, and afterwards at Venice, and again at Leghorn, did not by his residence there in that capacity lose his Scotch domicile. Colonel Udny was, therefore, a Scotchman by birth. But I am certainly inclined to think that when Colonel Udny married, and (to use the ordinary phrase) settled in life and took a long lease of a house in Grosvenor street, and made that a place of abode of himself and his wife and children, becoming, in point of fact, subject to the municipal duties of a resident in that locality; and when he had remained there for a period, I think, of thirty-two years, there being no obstacle in point of fortune, occupation, or duty, to his going to reside in his native country; under these circumstances, I should come to the conclusion, if it were necessary to decide the point, that Colonel Udny deliberately chose and acquired an English domicile. But if he did so, he as certainly relinquished that English domicile in the most effectual way by selling or surrendering the lease of his house, selling his furniture, discharging his serv-

ants, and leaving London in a manner which removes all doubt of his ever intending to return there for the purpose of residence. If, therefore, he acquired an English domicile, he abandoned it absolutely animo et facto. Its acquisition being a thing of choice, it was equally put an end to by choice. He lost it the moment he set foot on the steamer to go to Boulogne, and at the same time his domicile of origin revived. The rest is plain. The marriage and the consequences of that marriage must be determined by the law of Scotland, the country of his domicile.[8]

FIRST NAT. BANK OF NEW HAVEN v. BALCOM.

(Supreme Court of Errors of Connecticut, 1868. 35 Conn. 351.)

PARK, J.[9] The principal question in this case is in regard to the domicile of Mrs. Lewin at the time of her death. She died in the state of New York, and the administrator of her estate claims that her domicile at the time was in Connecticut; while the administrator of the estate of her husband claims that it was in the state of New York.

It appears by the finding of the court that her husband was a native of the state of New York; that he married Mrs. Lewin while temporarily residing in Connecticut; that immediately after their marriage they went to the state of Missouri, and resided there till the spring of 1862, when they returned to Connecticut, and after residing at various places in the state, became permanently located in the town of Branford. While their domicile continued there, Mrs. Lewin received a bequest that had been left her by her brother. Sometime in the spring of 1866 Mr. Lewin and his wife left Branford with the intent to abandon his residence there, and went to Geneseo in the state of New York, where he remained till the death of his wife, which occurred in the month of July of the same year.

The character of Mr. Lewin's residence at Geneseo is thus described in the report of the committee: "He did not go to Geneseo with the intent to adopt that place as a place of permanent residence. He and his wife, being in feeble health, went to Geneseo for the purpose of spending the summer there in the house of his brother-in-law, in the hope that the health of himself and wife might be benefited by the change of air, and by the use of the water of certain mineral springs near Geneseo. From the time he left Branford until the death of his wife he had no definite intentions in regard to the selection of any

[8] Accord: Bremme's Estate, 2 Pa. Dist. R. 455 (1893). In favor of doctrine that the domicile of origin reverts upon the abandonment of a domicile of choice with the intent of resuming the native domicile, see Allen v. Thomason, 11 Humph. (Tenn.) 536, 54 Am. Dec. 55 (1851); Reed's Appeal, 71 Pa. 378 (1872).

[9] The statement of facts has been omitted.

place as the place of his future residence. So far as he had any intention on the subject it was, during the whole period of time, an intention conditional and uncertain, whereby all decision in his mind upon the question was left in abeyance, to be determined in the future by the turn which his wife's disease might take, and by other circumstances which might or might not arise."

In the month of August of the same year he left Geneseo and returned to Connecticut, and not long afterwards became permanently settled in the town of Windham. These facts render it apparently clear that Mr. Lewin was not domiciled in the state of New York at the time his wife died.

But it is claimed that, inasmuch as he was a native of the state of New York, and inasmuch as he left Branford with no intention of returning to that place to reside, and went to the state of New York, and remained there, in fact, for a time, no matter what the character of his abiding may have been, he became domiciled there, on the principle that a native domicile easily reverts. Would it be claimed that if Mr. Lewin had left Branford with the intent to take up his residence in the state of Ohio, and on his way sojourned a few days in the state of New York, that would be sufficient? And what real difference is there between that case and the present? In both cases Mr. Lewin had no intention of permanently remaining in the state of New York. All the difference there is consists in the fact, that in one case his mind is made up in regard to his future residence and in the other it is not. His abiding in both cases is temporary. We said in another case upon the present circuit, that a temporary residence did not change its character by mere lapse of time. Whether it is longer or shorter it is temporary still. But the principle that a native domicile easily reverts applies only to cases where a native citizen of one country goes to reside in a foreign country, and there acquires a domicile by residence without renouncing his original allegiance. In such cases his native domicile reverts as soon as he begins to execute an intention of returning; that is, from the time that he puts himself in motion bona fide to quit the country sine animo revertendi, because the foreign domicile was merely adventitious, and de facto, and prevails only while actual and complete. The Indian Chief, 3 Rob. Adm. R. 17, 24; The Venus, 8 Cranch (U. S.) 253, 280, 301, 3 L. Ed. 553; State v. Hallett, 8 Ala. 159; In re Miller's Estate, 3 Rawle (Pa.) 312, 319, 24 Am. Dec. 345; The Ann Green, 1 Gall. (U. S.) 275, 286, Fed. Cas. No. 414; Catlin v. Gladding, 4 Mason (U. S.) 308, Fed. Cas. No. 2,520; Matter of Wrigley, 8 Wend. (N. Y.) 134, 140.

This principle has reference to a national domicile in its enlarged sense, and grows out of native allegiance or citizenship. It has no application when the question is between a native and acquired domicile, where both are under the same national jurisdiction. It was so held in the case of Monroe v. Douglas, 5 Maddock, 379. In that case the question was between the native domicile of a party in Scot-

land, and a domicile of residence acquired by the same party in India, and the Vice Chancellor said he could find no difference in principle between the original domicile of the party and the acquired one in India. See, also, 1 American Leading Cases, 742.

If this principle does not apply to the case in question, then it follows from this finding that Mr. Lewin had no domicile in the state of New York when his wife died, but his domicile at that time remained in the town of Branford, in accordance with the maxims that universally prevail in relation to this subject, that every person must have a domicile somewhere, that he can have but one domicile for one and the same purpose, and that a domicile once acquired continues until another is established. Abington v. North Bridgewater, 23 Pick. (Mass.) 170; Thorndike v. City of Boston, 1 Metc. (Mass.) 242; Crawford v. Wilson, 4 Barb. (N. Y.) 504; In re High, 2 Doug. (Mich.) 515; Somerville v. Lord Somerville, 5 Vesey, 750; Greene v. Greene, 11 Pick. (Mass.) 410; Walke v. Bank of Circleville, 15 Ohio, 288.

It is claimed further, that the bonds in question became the property of Mr. Lewin by donatio causa mortis. But it is clear that no gift was intended by Mrs. Lewin, as plainly appears by her letter to the officers of the bank, and besides, a gift of this nature must be made in contemplation of the approach of death and must be given to take effect only in case the donor dies. Raymond v. Sellick, 10 Conn. 480. Nothing of this kind appears in the case.

Again, it is claimed that the court of probate for the district of New Haven granted letters of administration on the estate of Mr. Lewin, as domiciled in the state of New York; and it is insisted that this is conclusive on the subject. But the judgment of a court of limited jurisdiction is never conclusive of a jurisdictional question. Its jurisdiction may always be controverted. Sears v. Terry, 26 Conn. 273; Jochumsen v. Suffolk Sav. Bank, 3 Allen (Mass.) 87; 2 Redfield on Wills, 49.

We advise the superior court that the administrator of the estate of Mrs. Lewin is entitled to the property.[10]

A good note. In accord with Bulow case, & shows reasoning why am. Rl. differs from Eng. Rl. -

[10] See Minor, Conflict of Laws, §§ 65, 66.

"Domicile may be either national or domestic—the former, in which nationality a man is domiciled; and the latter, in which subdivision of the nation. And in this respect the law of domicile in Louisiana, in relation to its different political subdivisions, may be applied to the change of domicile from one state to another. In not keeping in view the distinction between the two kinds of domicile, in some cases in this country, the domicile of birth, as recognized in England, has been given too much weight in estimating the value of the floating intention to return to the first domicile. The conditions which control the destinies of families in the two countries are materially different. In one it is a rule to keep families together. They grow up for generations on the same spot. Local traditions control them, and there are not entirely obliterated some influences of the feudal period. Here, the customs, the habits of the people, their ceaseless energies, their continuous change from locality to locality, the sudden and dense population of new places, the desertion and abandonment of old ones, all show that the people are migratory, and not much influenced by birth, locality, or the local history of families. Hence we conclude that it will require the same facts only to show a change of domicile

HARRALL v. WALLIS.

(Court of Chancery of New Jersey, 1883. 37 N. J. Eq. 458.)

See post, p. 592, for a report of the case.

In re YOUNG JOHN ALLEN.

(United States Court for China, 1907. 1 Am. J. of Int. Law, 1029.)

WILFLEY, J. 1. In view of the well-established principle of law that the personal property of a deceased person must be administered according to the law of his domicile, it becomes necessary at the outset to determine where the testator in the will here presented for probate was domiciled at the date of his death.

The facts in this case are as follows: Dr. Young J. Allen was born in the year 1836 in the state of Georgia. In 1860 he moved to China, where he lived continuously for a period of forty-seven years. He died in Shanghai on May 30, 1907. China was the chosen field of his activities, and the instruction of its people in the principles of Christian civilization was his life work. Here his family was reared and now lives. Here his estate, consisting solely of personal property, was accumulated, and it was his oft expressed intention to make China his permanent home. The will which his legal representatives now present for probate is wholly in his own handwriting, and was duly attested by two witnesses. Neither of these witnesses, however, is within the jurisdiction of the court. This being the case, the instrument before the court must be regarded as a holographic will, which, under the common law now in force in China, is valid, but the court is not informed that such a will is recognized by the law of Georgia.

These facts present for consideration one of the most complex and important subjects connected with the operation of the law of extraterritoriality. Succinctly stated, the legal question here involved is: Can an American citizen acquire what may be termed an extraterritorial domicile in China? Can he have a domicile out of the United States in which he is nevertheless governed by the laws of the United States, or must he retain that of the state where he was domiciled before settling in China? In investigating this subject, it will be necessary to have a clear conception, first, of the American law of domicile, and, second, of the true meaning of extraterritoriality.

2. That a person must always have a domicile somewhere, that no person may have more than one domicile at a time, that every natural

from the domicile of birth that it would require to show a change from one selected domicile to another. The revival of the intention to return to the domicile of birth does not apply when the domicile of origin and of selection are both domestic. Guier v. O'Daniel, 1 Am. Lead. Cas. 734." McEnery, J., in Succession of Steers, 47 La. Ann. 1551, 18 So. 503, 504 (1895).

person free and sui juris may change his domicile at pleasure, and that civil status, with its attendant rights and disabilities, depends, not upon nationality but upon domicile, are propositions upon which the authorities are universally agreed. While domicile has been defined by law writers in a variety of ways, yet there are two elements which are found in all definitions, namely, residence and animus manendi, or intention of continued residence. In recent years, however, there has been a tendency on the part of the courts to modify this definition by substituting for the animus manendi, or intention of residing permanently in a certain place, the absence of the animus revertendi, or the intention of returning to the place of former residence.

Vattel defines domicile as "an habitation fixed in some place with the intention of remaining there always." Savigny says, "That place is to be regarded as a man's domicile which he has freely chosen as his permanent abode (and thus for the center at once of his legal relations and his business)." According to Judge Story, "That place is properly the domicile of a person in which his habitation is fixed without any present intention of removing therefrom." Phillimore defines it as "Residence at a particular place accompanied with (positive or presumptive proof of) an intention to remain there for an unlimited time." The definition of Vice Chancellor Kindersley, while lacking in precision, is perhaps more comprehensive than any of the foregoing. It is as follows: "That place is properly the domicile of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected or uncertain) shall occur to induce him to adopt some other permanent home." Dicey, Conflict of Laws (American Notes by Moore) p. 728.

Mr. Webster, while Secretary of State, had occasion to consider the law of domicile, and expressed his views on the subject as follows:

"The general rule of the public law is, that every person of full age has a right to change his domicile; and it follows, that when he removes to another place, with an intention to make that place his permanent residence, or his residence for an indefinite period, it becomes instantly his place of domicile; and this is so, notwithstanding he may entertain a floating intention of returning to his original residence or citizenship at some future period. * * * In questions on this subject, the chief point to be considered is the animus manendi, or intention of continued residence; and this must be decided by reasonable rules and the general principles of evidence. If it sufficiently appear that the intention of removing was to make a permanent settlement, or a settlement for an indefinite time, the right of domicile is acquired by a residence even of a few days." Thrasher's Case, Moore, International Law Digest, vol. 3, p. 818.

The feature here prominently brought out, that domicile will not be defeated by a mere "floating intention" to remove from the locality at

some future date, has been adopted by American courts in recent years. Gilman v. Gilman, 52 Me. 165, 83 Am. Dec. 502.

In view of the foregoing we feel warranted in stating that under American law a person's domicile is that place which he has freely chosen for his abode and from which he has no present intention of removing.

3. It now becomes necessary to ascertain if there be any reason why the foregoing principles may not be applied to American citizens residing in a country with which the United States has a treaty of extraterritoriality. This leads to an investigation of the real meaning of extraterritoriality. It is well-nigh impossible to give an exact definition of the term, yet its practical application is not difficult of comprehension. Broadly speaking, extraterritoriality is a term used to describe the act by which a state extends its jurisdiction beyond its own boundaries into the territory of another state, and exercises the same over its nationals who, for the time being, may be sojourning in the territory of the other state. It is usually based upon treaty, but the rights and privileges arising therefrom are frequently amplified by usage and sufferance. Extraterritoriality is put in operation mainly by Western states in oriental countries where it signifies principally the exemption of the nationals of said Western states from local jurisdiction, and a corresponding exercise of jurisdiction over them by their own national authorities.

For the purpose of ascertaining the practical operation of the law of extraterritoriality, we shall now trace in brief outline the history of its application in China by two prominent Western nations, the United States and Great Britain, under their treaties of extraterritoriality with that country. It will be observed that the treaties under which these two nations operate in China are substantially the same. Great Britain, however, has exercised its rights and privileges under the treaties and developed its law of extraterritoriality in China to a far greater extent than has the government of the United States.

The first treaty of extraterritoriality between the United States and China was entered into on July 3, 1844, and a second treaty was concluded on June 18, 1858. Articles XXV and XXVII, respectively, of said treaties provide: "All questions in regard to rights, whether of property or of person, arising between citizens of the United States in China, shall be subject to the jurisdiction and regulated by the authorities of their own government."

Congress in 1848 and in 1860 enacted statutes for the purpose of carrying into full force and effect the provisions of these treaties, and to that end extended certain laws to China and created consular courts, vesting them with authority to apply and execute said laws. The body of laws which Congress has extended to Americans in China consists of those statutes of the United States suitable to carry the treaties into effect, the common law, including the law of equity and admiralty, and certain regulations of the American Minister to China promulgated to

supply the deficiencies in these laws. Rev. St. U. S. § 4086 (U. S. Comp. St. 1901, p. 2769).

On June 30, 1906, Congress passed the act creating this court and vested it substantially with the jurisdiction formerly exercised by the consular courts. (For a complete statement of the history of the American law of extraterritoriality in China, see Hinckley, American Consular Jurisdiction in the Orient).

Great Britain, on the other hand, by successive foreign jurisdiction acts from 1843 to 1890, by numerous orders in council, by regulations promulgated by the British Minister at Peking, and by the decisions of the British Supreme Court at Shanghai, has amply provided for the protection and government of its subjects in China, and has probably carried the law of extraterritoriality in China to a higher degree of development than any other foreign power. The extent to which Great Britain has exercised its power under the treaties will appear from an examination of what is known as the foreign jurisdiction act of 1890, and an examination of the jurisdiction possessed by the British Supreme Court at Shanghai. Section 1 of the foreign jurisdiction act, provides:

"It is and shall be lawful for Her Majesty the Queen to hold, exercise and enjoy any jurisdiction which Her Majesty now has or may at any time hereafter have within a foreign country in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory."

Section 3 of the act provides:

"Any act or thing done in pursuance of any jurisdiction of Her Majesty in a foreign country shall be as valid as if it had been done according to the local law then in force in that country."

And paragraph 2 of section 5 provides:

"Thereupon those enactments (described in the first schedule of this act) shall, to the extent of that jurisdiction, operate as if that country were a British possession and as if Her Majesty in Council were the Legislature of that possession."

53 and 54 Victoria, chapter 37.

The British Supreme Court in Shanghai, which was established in 1866, is vested with jurisdiction to execute the laws which Great Britain has extended to its subjects in China. This court is in fact a British court, and in addition to ordinary civil jurisdiction, exercises jurisdiction in cases involving admiralty, bankruptcy and lunacy, and in addition to the ordinary criminal jurisdiction, it exercises jurisdiction in some special statutory offences such as offences against the patents and trade-marks acts. Piggott, Extraterritoriality, p. 40. To such an extent has the British jurisdiction in China been developed that there is almost no legislative or judicial phase of the law in force in England which, if necessary in China, has not its counterpart here. On the other hand, "common law" and "equity" form the vague and indefinite description of the main law in force in respect to Americans in China.

From the foregoing it will be seen that while the Emperor of China exercises nominal sovereignty over all Chinese territory including that occupied by the nationals of the United States and Great Britain, yet the jurisdiction of these two countries over their own citizens who reside in China is, for all practical purposes, as full and complete as if China were in fact territory belonging to these nations.

4. We come now to the consideration of the main question in this case, namely, whether there be anything in the practical operation of the law of extraterritoriality fatal to the application of the principles of the American law of domicile to Americans residing in China. So far as we are able to ascertain, this question has not been passed upon by the courts of the United States, nor has it been made the subject of discussion by the executive branch of the government. It has, however, received the careful consideration of the courts of last resort of Great Britain with the unlooked for result that there is now no such thing known to the British law of extraterritoriality as an Anglo-Chinese domicile.

The leading case on this subject originated in Shanghai, and is known as Tootal's Trusts. The facts in this case were as follows: After some previous changes of residence, Tootal, a subject of Great Britain, in 1862 came to reside in Shanghai, and with the exception of some short visits to England for health and business, he continued to reside at Shanghai until 1878, the date of his death. It was admitted that some years before his death he had determined to reside permanently at Shanghai, had relinquished all intention of ever returning to England and had expressed this intention on a number of occasions. In his will he described himself as a resident of Shanghai in the Empire of China. The decision of the court was written by Mr. Justice Chitty, who held that British subjects in Eastern countries in all cases retain their domicile in that portion of the British Empire in which they were domiciled previously to taking up their abode in an Eastern state. The decision is based on the proposition that residence in a "territory" is an essential part of the legal idea of domicile, and holds that "there is no authority that an individual can become domiciled as a member of a community which is not a community possessing the supreme or sovereign territorial power." Re Tootal's Trusts, L. R. 23 C. D. 532.

The doctrine thus laid down was followed by the court in the case of Abd-ul-Messih v. Farra, 13 App. Cas. 431. The decision in this case was written by Lord Watson. "Their Lordships," he says, "are satisfied that there is neither principle nor authority for holding that there is such a thing as domicile arising from society and not from connection with a locality. In re Tootal's Trusts is an authority strictly in point, and their Lordships entirely concur in the reasons by which Mr. Justice Chitty supported his decision in that case." See, also, Maltass v. Maltass, 1 Rob. Ecc. 80, and The Indian Chief, 3 Rob. Adm. 29.

While these decisions fix the law of Great Britain on this subject for the present, the doctrine here laid down has not commended itself to

the judgment of the leading British commentators on the subject of extraterritoriality. Sir Francis Piggott, Chief Justice of Hongkong, in a work which has just come from the press, expresses the opinion "that when the question is again raised it will be found that the principles established by the most recent cases necessitate a reconsideration of the law laid down on the subject by Mr. Justice Chitty." The learned justice then enters upon an exhaustive examination of the principle upon which the foregoing decisions are based, and discusses the same in the following manner:

"At the time when many of the definitions were framed, the law applicable to extraterritoriality was little known, and in some cases was not present in the minds of the judges who framed them. 'Locality' and 'territory' were obviously the terms which would be used; the community among which a person settled being as obviously identified with the locality. But it attached undue importance to the word to insist that because 'locality' is used in the definitions in cases where there could be no questions as to its fitness, therefore it excluded the idea of 'relationship to a community' in the first case that came up for argument, in which the point was whether 'relationship to a community' is or is not involved in domicile. * * * The community referred to is of course the community which inhabits a country, or a definite locality; in other words, a community which has laws and customs of its own, which the government of the locality imposes on all members of it; but the question is whether the reason of the rule, the whole principle on which it is based, do not render it as applicable to an extraterritorial community as to a territorial one. On the hypothesis the circumstances may be the same in the one as in the other. A man may set up his home in a treaty port, he may have banished forever the idea of returning to his native country; the animus manendi may be clear, without shadow of doubt. On the hypothesis, too, there is a body of law regulating the community. Why is it impossible, then, for the ordinary principles of the law to be applied, and for the personal relations of the permanent members of the community to come under that law permanently as the law of the domicile of their choice; of those who are born members of the community as the law of the domicile of their origin? * * * Linking these two propositions together, it is suggested that the inevitable result is a modification of Lord Watson's interpretation of the law of domicile referred to above on the following lines: The law which regulates a man's personal status must be that of the governing power in whose dominions his intention is permanently to reside, or must be so recognized and established by that governing power as to be in fact the law of the land." Piggott, Extraterritoriality, pp. 228, 230, 232, 233.

The subject has also been carefully gone into by Hall, the celebrated authority on International Law, in his work on the Foreign Jurisdiction of the British Crown. He also takes issue with the court in the

Tootal's Trusts Case, and expresses his views on the subject as follows:

"It is perhaps to be regretted that a change in the law is not made which a short order in council could easily effect. Anglo-Oriental domicile has its reasonable, it may also be said, its natural, place. Conflicts between the differing laws of England, of Scotland, of the various self-governing colonies, are inevitable within British jurisdiction in the East; but it is unnecessary to multiply the points of collision. So long as persons have not identified themselves with the life of a new community, they must keep each his own law; but as soon as they have shown their wish and intention to cut themselves adrift from the association of birth, they prove their indifference to the personal law attendant on their domicile of origin. There is, therefore, no reason why simplicity and unity of law should not be gained for British subjects by attributing community in the laws of England to all of European blood. There is also every reason for avoiding very grave difficulties of another kind, which are opened through invariable preservation of the domicile of origin. English families, even in the present day, often remain through more than one generation in Oriental countries as their permanent place of abode. Formerly the history of persons whose domicile might become a matter of importance was generally known sufficiently well. Many are now of obscure antecedents and of an origin uncertain among the numerous places from which British subjects can derive. As no domicile can be acquired in an Anglo-Oriental community, it becomes every year more probable that cases will occur in which the determination of the domicile of a father, perhaps of a grandfather, may become necessary, and in which it may be equally impracticable to impute an English domicile or to attribute any other with fair probability. It would be a great advantage that in such cases there should be a fixed rule which should correspond with the obvious facts, and that the courts, instead of searching with infinite trouble and expense for an ancestral domicile should be enabled to find that a domicile had been acquired in the Eastern country which carried with it the application of English law; that, in other words, residence in China under English law, with the animus manendi, should imply domicile in China under the condition of the applicability of the special law of the English community established there, as that law is defined by order in council. Theoretically the conception of such a domicile is unobjectionable if once the mind is cleared of the notion, at present dominant, that domicile is the creature of place and intention alone. In Europe it is so, because residence in a place implies subjection to the common territorial law, and to no other; in the East it is not necessarily so, because residence there implies subjection to the law of one or other of several different communities, the personal laws of which receive equal recognition from the territorial sovereign power. Association with place is necessary to domicile; but it is not always the sole determinant factor. In any case, even if the conception of domicile here suggested be anomalous, the

convenience of giving effect to it is large enough to excuse a certain sacrifice of logical principle." Hall, Foreign Jurisdiction of the British Crown, pp. 184–186.

After a careful consideration of the principles of law on this subject as well as the practical demands of the situation, this court is inclined to give greater weight to the foregoing argument of Mr. Hall than to the line of reasoning adopted by Mr. Justice Chitty in the Tootal's Trusts Case. We can see no good reason for holding that a citizen of the United States cannot be domiciled in China. Mr. Justice Chitty's decision destroys in their application to China all the definitions of domicile contained in the books. It ignores both of the essential elements of residence and intention. The British courts were correct when they stated that there was no authority for holding that an individual could not become domiciled as a member of a community which was not a community possessing the supreme or sovereign territorial power. This fact, however, is without significance when it is noted that the courts were considering the first case of this character which had ever been presented for judicial determination. At the time the Tootal's Trusts Case came up for consideration, the British law of extraterritoriality was not so well developed as it is now, and the subsequent trend of events has given it a different meaning from what it had at the time the decision was rendered. It was quite natural for the courts thirty years ago to announce that the immiscible character of the two races and the radical difference between the religions, customs, habits and laws of peoples of the two countries raised a strong presumption against a British subject becoming domiciled in China. At that time it was doubtless the fixed purpose of the majority of those who came to China to sojourn here only a few years and then to return to the country from which they came. This is not the case at present. Many families dwell here now with the fixed purpose of making China their permanent home. There are abundant examples of families permanently located here, and this is likely to become more common in the future. In view of this fact, the number of heirs and distributees of foreign citizens decedent in China who live in China in proportion to those who dwell in the countries from which said foreigners came, is rapidly growing larger, thus necessitating the adoption of a rule which will meet the practical demands of the situation.

From the standpoint of expediency, Hall has very clearly pointed out that conflicts between the laws of England, Scotland and various self-governing colonies are inevitable within British jurisdiction in the East. This proposition is too clear to require the support of argument. If this court should adopt the rule laid down by the British courts, such conflicts would be perhaps more numerous and more pronounced in the administration of American law in China than in administration here of the law of Great Britain. The adoption of such a rule would put this court to the necessity in the matter of probating wills of applying the laws of forty-six different commonwealths, to say nothing of the

laws of our territories and insular possessions. This would be practically impossible. Furthermore, the adoption of the British rule would require this court not only to hold that Dr. Allen, who had resided in China for forty-seven years and who had expressed his intention of residing here permanently, was domiciled in Georgia, but also to hold that his children and grandchildren, some of whom have never been in Georgia, and who never expect to reside there, are nevertheless domiciled in that state. This proposition is too extravagant to be maintained. It requires a greater stretch of the imagination and the adoption of a greater fiction of law to hold that a person can be domiciled in a country where he does not reside and has no intention of residing at any future time than to hold that a citizen of a foreign state can acquire an extraterritorial domicile in a community which is not the community possessing the sovereign territorial power. Every consideration of reason and convenience demands that the American law of domicile be applied by American courts in China.

We hold therefore:

First: That there is nothing in the theory or practical operation of the law of extraterritoriality inconsistent with or repugnant to the application of the American law of domicile to American citizens residing in countries with which the United States has treaties of extraterritoriality.

Second: That Dr. Young J. Allen, having lived in China for a period of forty-seven years and having expressed his intention to live here permanently, thereby acquired an extraterritorial domicile in China; consequently this court in the administration of his estate will be guided by the law which Congress has extended to Americans in China, which is the common law.[11]

[11] As to Anglo-Indian, Anglo-Turkish, and like domiciles, see Westlake, Priv. Int. Law, 309–322. See, also, C. H. Huberich, Domicile in Countries Granting Extraterritorial Privileges to Foreigners, 24 Law Quar. Rev. 440–448.

For law governing acts in uncivilized countries, see Dicey, Conflict of Laws, 724–726.

SECTION 2.—DOMICILE OF MARRIED WOMEN.

TOWN OF WATERTOWN v. GREAVES.

(Circuit Court of Appeals, First Circuit, 1901. 112 Fed. 183, 50 C. C. A. 172, 56 L. R. A. 865.)

In Error to the Circuit Court of the United States for the District of Massachusetts.

BROWN, District Judge.[12] This writ of error is brought to review the rulings of the Circuit Court for the District of Massachusetts in an action of tort for the recovery of damages for injuries caused by a defective sidewalk.

The first question to be considered is that of jurisdiction. The plaintiff below sued as a citizen of Rhode Island. It is contended for the town that upon the evidence the plaintiff below was not a citizen of Rhode Island, and that the court erred in the instructions to the jury as to the right of a married woman, deserted by her husband, to establish an independent domicile.

That the plaintiff below went to Rhode Island before the date of the writ, April 3, 1900, with the intention of living there permanently, must be taken as a fact established by a special finding of the jury. Other relevant facts are that the plaintiff and her husband resided together at Lowell, Mass., and were citizens of that state until some time in 1892 or 1893, when her husband deserted her, and has never since lived in Lowell or contributed to her support; that she has not seen or heard from him since, and that at the date of trial she did not know whether he was alive or dead; that she never had procured a divorce, and, so far as she knew, her husband had never made application for a divorce. The record contains no evidence of the circumstances under which the husband of the plaintiff below deserted her; but, inasmuch as it is the ordinary duty of the husband to abide with the family, there is, in the present case, a sufficient presumption that the wife was guilty of no fault, in the absence of any suggestion to the contrary based on the evidence. The evidence was insufficient to establish a presumption of death. Neither was there any evidence that the husband had left the state of Massachusetts, or had changed the citizenship which he had at the date of desertion. It appeared that the plaintiff was obliged to support herself by her own exertions.

The third assignment of error is as follows: "The court erred in instructing the jury that, while the general rule of law is that the domicile and citizenship of a wife follow that of her husband, still, if a husband deserts his wife, as there is evidence tending to show was

[12] A part of the opinion relating to questions other than domicile has been omitted.

the fact in this case, the wife's domicile would not necessarily follow that of her husband; that plaintiff might acquire a domicile and citizenship in Rhode Island, independent of that of her husband, if he were living; that if the husband deserted his wife and abandoned his residence, and went to parts unknown, and there remained for years without having any communication with his wife, and without making any contribution to her support, the wife had the right to acquire a domicile and citizenship, if she choose so to do, in a place different from that of the domicile and citizenship of her husband at the time he deserted her, or from the place of the domicile or citizenship of the husband after such desertion."

It is well settled that each state has the right to determine the civil status and capacities of its inhabitants. Pennoyer v. Neff, 95 U. S. 714, 722, 24 L. Ed. 565; Hekking v. Pfaff (C. C.) 82 Fed. 403.

An examination of the decisions of the Supreme Court of Rhode Island upon the question of the right of a deserted wife to establish for herself an independent domicile satisfies us that there was no error in the instructions above set forth.

In Ditson v. Ditson, 4 R. I. 87 (a leading case in this country; see Atherton v. Atherton, 181 U. S. 166, 21 Sup. Ct. 544, 45 L. Ed. 794), Chief Justice Ames said, on page 107: "Although, as a general doctrine, the domicile of the husband is, by law, that of the wife, yet when he commits an offense, or is guilty of such dereliction of duty in the relation as entitles her to have it either partially or totally dissolved, she not only may, but must, to avoid condonation, establish a separate domicile of her own. This she may establish—nay, when deserted or compelled to leave her husband, necessity frequently compels her to establish—in a different judicial or state jurisdiction than that of her husband, according to the residence of her family or friends. Under such circumstances she gains, and is entitled to gain, for the purposes of jurisdiction, a domicile of her own, and, especially if a native of the state to which she flies for refuge, is, upon familiar principles, readily redintegrated in her old domicile."

The court says also: "Whatever was the former domicile of the petitioner, we are satisfied that she is, and has, for upwards of the last three years, been a domiciled citizen of Rhode Island, her only home, in the house of her father; and that as such citizen, and upon such notice, we have power and jurisdiction over her case, and to change her condition from that of a married to that of a single woman, granting to her the relief which, under like circumstances, the law and policy of Rhode Island accords to all its citizens."

From this decision it would appear to be the law of Rhode Island that a married woman, unlawfully deserted by her husband, may establish an independent domicile, and thus become a citizen of the state of Rhode Island.

It is contended that this decision is merely to the effect that she may establish a domicile for the purposes of divorce. We regard it,

however, as a clear and learned statement of limitations, upon the general rule that the domicile of the husband is that of the wife.

The learned Chief Justice, after stating the general doctrine, proceeds: "A more proper case for the application in favor of a petitioner for divorce of the foregoing principles relating to the jurisdiction of the court over her case, and to the question of her domicile in this state, can hardly be imagined."

From this decision, it is apparent that the court did not consider a judicial decree essential as a condition precedent to the establishment of citizenship, since it is in express terms stated that the petitioner, for upwards of three years, had been a domiciled citizen of Rhode Island.

For the town it is contended that the right of a married woman is limited to a quasi domicile for the purposes of divorce, and that this decision goes no further. But the question of citizenship was directly passed upon, and citizenship was held to exist upon a state of facts showing unjustifiable desertion.

Moreover, the case of Howland v. Granger, 22 R. I. 2, 45 Atl. 740, contains a statement by the Supreme Court of Rhode Island which seems to us satisfactory evidence that the domicile which the wife may acquire upon desertion is not merely a quasi domicile for the purposes of divorce, leaving her general rights as a citizen of the state in abeyance until the pronouncement of a decree of divorce, a vinculo or a mensa et thoro, but a full and independent domicile for all purposes. This case was an action brought by a married woman to recover the amount of a personal property tax paid under protest. The husband, on the day of the assessment, was a domiciled inhabitant of the state of Rhode Island. The wife was at that time living in Asheville, N. C., for her health, with the intention of making said place her permanent home, and contended that she was a citizen of North Carolina, and therefore not liable to a personal tax in Rhode Island. There was no abandonment. The persons were living apart, but the unity of the marriage relation existed undisturbed. No question of divorce was involved. The court said: "After a careful examination of the authorities, however, we have come to the conclusion that though a wife may acquire a domicile distinct from that of her husband whenever it is necessary or proper for her to do so, as, for instance, where the husband and wife are living apart by mutual consent (In re Florance, 54 Hun, 328, 7 N. Y. Supp. 578); or where the wife has been abandoned by the husband (Shute v. Sargent, 67 N. H. 305, 36 Atl. 282); or for purposes of divorce (Ditson v. Ditson, 4 R. I. 87); or, in short, whenever the wife has adversary interests to those of her husband—she cannot acquire such a domicile so long as the unity of the marriage relation continues, notwithstanding that from considerations of health, as in the present case, or of expediency, one of the parties, with the consent of the other, is actually living in a

different place from the other." See, also, White v. White, 18 R. I. 292, 27 Atl. 506.

The defendant, now plaintiff in error, contends that "the proposition that the exception made in divorce cases to the common-law rule, as to the domicile of the wife following that of the husband, does not extend to proceedings other than a suit for divorce, was expressly declared by the Supreme Court in Barber v. Barber, 21 How. 582, 16 L. Ed. 226."

We do not so read this opinion. The point there involved was whether a woman who had been divorced a mensa et thoro might establish an independent domicile. It was decided that she could. It was neither decided nor intimated in the opinion that an independent domicile could not be established without a judicial decree. The court seems, however, to have recognized the following principles:

The rule that the domicile of the wife is that of the husband is probably found to rest upon the legal duty of the wife to follow and dwell with the husband wherever he goes.

That, upon the commission of an offense which entitles her to have the marriage dissolved, she is discharged thereby immediately, and without a judicial determination of the question, from her duty to follow and dwell with him.

That if the husband abandons their domicile and his wife, and relinquishes altogether his marital control and protection, he yields up that power and authority over her which alone make his domicile hers.

Upon page 594, 21 How., and page 230, 16 L. Ed., of the opinion, in a quotation from Bishop, appears this language: "Courts, however, may decline to recognize such domicile in a collateral proceeding; that is, a proceeding other than a suit for divorce."

It may be considered, in some jurisdictions, that the appropriate proceeding for establishing the wrongs which entitle a wife to an independent domicile is a proceeding for divorce a vinculo or a mensa et thoro, and that, in consequence of the difficulties of establishing these wrongs in a collateral inquiry, the courts should require an adjudication by a divorce court which determines finally and for all purposes the status of the wife. See Minor, Conf. Laws, § 47. But this is rather a rule of procedure or of evidence than a rule of right, and is analogous to the rule of equity that a creditor shall establish his right by a judgment of law, before attacking in equity a fraudulent conveyance.

There seems to be no conflict of authority as to the point that, by the delictum of the husband, the wife is immediately absolved from her duty to follow and dwell with him, and that she is thereafter entitled, as a matter of right, to choose her own domicile.

We are of the opinion that the question whether, in order to assert or establish this right in a collateral proceeding, she must first procure

a judicial decree establishing her status, as against her husband and all the world, is a distinct question.

If a plea in abatement had raised the question of the wife's domicile, and, before a hearing on the plea, she had applied to the divorce courts of Rhode Island and procured a decree of divorce, that decree, so far as the question of citizenship was concerned, would give her no new rights, but would furnish her with judicial evidence that before the bringing of her action she was a citizen of Rhode Island.

The rulings of the circuit court as to the legal rights of a deserted wife, in the case at bar, were in accordance with the law as stated in Cheever v. Wilson, 9 Wall. 108, 124, 19 L. Ed. 604, 609: "The rule is that she may acquire a separate domicile whenever it is necessary or proper that she should do so. The right springs from the necessity for its exercise, and endures as long as the necessity continues. The proceeding for a divorce may be instituted where the wife has her domicile."

This implies that the domicile may be acquired prior to and independently of proceedings for divorce. And this implication is in agreement with the express decision of the Rhode Island court.

Moreover, various expressions of the Supreme Court seem to recognize that, if the wife is living apart by the fault of the husband, the rule that his domicile is her domicile is inapplicable. Thus, in Atherton v. Atherton, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794, are repeated the expressions of the court in Cheely v. Clayton, 110 U. S. 701, 705, 709, 4 Sup. Ct. 328, 330, 28 L. Ed. 298, 299: "If a wife is living apart from her husband without sufficient cause, his domicile is in law her domicile," and "it is hard to see how, if she unjustifiably refused to live with her husband, * * * she could lawfully acquire in his lifetime a separate domicile in another state," etc.

The question whether the wife, in order to bring suit as a citizen of another state from that in which her husband is domiciled, must establish her right to acquire a separate domicile by the judgment of a proper tribunal in a direct proceeding for that purpose, is one that presents difficulties.

It may be said that there are practical difficulties in trying collaterally the relations of husband and wife, and in determining whether or not the husband has been guilty of such a delictum as justifies a separate domicile. But similar difficulties do not preclude a husband from asserting, in defense of an action for supplies furnished to a wife, the adultery or other misconduct of the wife. Such cases involve a collateral inquiry into the rights of husband and wife arising from a breach of the obligations of marriage, yet it has never been held that the husband must establish the fact of the wife's delictum in a direct proceeding for that purpose. Gill v. Read, 5 R. I. 343, 73 Am. Dec. 73.

The wife may not desire a divorce a vinculo or a mensa et thoro; she may be ready to condone the fault of the husband in case he shall

return; she may desire, for her own sake or that of her family, to avoid publicity; or she may die before she has established her rights by a judicial decree.

The difficulties that might arise from adopting a rigid rule that the wife's domicile shall be presumed to be her husband's until she overcomes this presumption by a judicial decree seem more serious than those that would arise from trying the question of domestic relations collaterally.

We should hesitate long before deciding that the only exception to the rule that the domicile of the wife follows that of her husband is in judicial proceedings whose express object is to show that the relation itself ought to be dissolved or modified, since there is grave danger that serious injustice might arise. See Le Sueur v. Le Sueur, 1 Prob. Div. 139–142; Eversley, Dom. Rel. (1896) p. 167.

2 Bish. Mar. & Div. §§ 114, 115, upon which counsel for the town relies, seems to recognize that the rule should not always prevail in non-divorce cases.

Furthermore, upon principle, it is difficult to see why a wife who is completely abandoned by her husband, even in consequence of her own fault, should be precluded from establishing an independent domicile. If the husband, justifiably or unjustifiably, renders it impossible for her to dwell with him, and voluntarily relinquishes altogether his marital control and protection, so that the abandonment is a completed fact, it cannot be said, in strictness, that her dwelling apart from him is her continuous fault. Her original fault may have justified the abandonment, but his renunciation of his former obligations keeps her from his home, and if she must find for herself another home, and from necessity or convenience goes to another state, it is difficult to see why she should be precluded from the ordinary rights of a citizen of that state. The expressions of the supreme court in Atherton v. Atherton, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794, which relate to a wife living apart without sufficient cause, or through an unjustifiable refusal to live with the husband, do not cover a case in which the living apart is caused by the husband's total abandonment of the wife.

In the present case, however, we are relieved from a consideration of this question by the presumption that the wife was guilty of no fault which justified either the original desertion or its long continuance.

We are of opinion especially that in the present case, and upon the present assignments of error, the defendant is not entitled to make the objection that the proper evidence of the right of the wife to an independent domicile is a judicial decree.

No objection was made to the introduction of evidence of facts upon which, according to the general law as well as the law of Rhode Island, the wife became entitled, as a matter of legal right, to establish an independent domicile.

The defendant below was content to rely upon the proposition that upon all the evidence the plaintiff was not a citizen of Rhode Island. No objection was made to trying the question of the relations of husband and wife collaterally. The objection that she had not established her rights by a judicial decree, and that the defendant should not be compelled to try the question of the relations of husband and wife in this action, was not made, and must be held to have been waived. * * *

The judgment of the Circuit Court is affirmed, with interest and with costs.[13]

SECTION 3.—DOMICILE OF MINORS.

LAMAR v. MICOU.

(Supreme Court of the United States, 1884. 112 U. S. 452, 5 Sup. Ct. 221, 28 L. Ed. 751.)

See post, p. 716, for a report of the case.[14]

[13] See Gordon v. Yost (C. C.) 140 Fed. 79 (1905); McKnight v. Dudley, 148 Fed. 204, 78 C. C. A. 162 (1906).

"It is an open question whether even a judicial separation (not amounting to a divorce) would give a wife the power to acquire a domicile for herself." Dicey, Conflict of Laws, 132. See, also, Westlake, Priv. Int. Law, 325.

As to capacity of a married woman to acquire a separate domicile from her husband, see 59 L. R. A. 146–149, 84 Am. St. Rep. 27–37; Minor, Conflict of Laws, §§ 47–51.

[14] A legitimate child takes the domicile of his father. Lamar v. Micou, 112 U. S. 452, 5 Sup. Ct. 221, 28 L. Ed. 751 (1884); Allgood v. Williams, 92 Ala. 551, 8 So. 722 (1891). And after the death of his father ordinarily that of his mother. Potinger v. Wightman, 3 Meriv. 67 (1817); Brown v. Lynch, 2 Bradf. Sur. (N. Y.) 214 (1852). But it ceases to follow that of the mother upon her remarriage. School Directors of Borough of Westchester v. James, 2 Watts & S. (Pa.) 568, 37 Am. Dec. 525 (1841); Allen v. Thomason, 11 Humph. (Tenn.) 536, 54 Am. Dec. 55 (1851). Contra: Succession of Lewis, 10 La. Ann. 789, 63 Am. Dec. 600 (1855). See Minor, Conflict of Laws, §§ 38, 39. The domicile of an illegitimate child follows that of his mother. Udny v. Udny, L. R. 1. H. L. Sc. 441 (1869); Blythe v. Ayres, 96 Cal. 532, 31 Pac. 915, 19 L. R. A. 40 (1892). If legitimated, he takes that of his father. See Minor, Conflict of Laws, § 33.

As to emancipated and abandoned children, see Jacobs on Domicile, §§ 231–237.

It has been held that a married minor cannot acquire an independent domicile. Robertson v. Robertson, 30 Vict. L. R. 546 (1905). See Minor, Conflict of Laws, § 45.

An orphan will not acquire the domicile of his guardian unless he is taken into the guardian's family. School Directors of Borough of West Chester v. James, 2 Watts & S. (Pa.) 568, 37 Am. Dec. 525 (1841).

An appointed guardian is generally regarded as possessing no authority to change his ward's domicile beyond the territory of the state in which he was appointed. See Lamar v. Micou, 112 U. S. 452, 5 Sup. Ct. 221, 28 L. Ed. 751

(1884). See, also, 89 Am. St. Rep. 278–280; 58 L. R. A. 931–941; Minor, Conflict of Laws, §§ 40, 41.

As to the acquisition of a domicile by an insane person placed under guardianship, see Talbot v. Chamberlain, 149 Mass. 57, 20 N. E. 305, 3 L. R. A. 254 (1889); Mowry v. Latham, 17 R. I. 1180, 23 Atl. 13 (1891); Minor, Conflict of Laws, § 55.

CONTINENTAL LAW.—The law of nationality determines the civil status of a person. *France*, article 3, Civ. Code; *Germany*, articles 7, 13–15, 17–22, Law Intr. Civ. Code; *Italy*, article 6, Prel. Disp. Civ. Code. The law of domicile plays, therefore, a comparatively subordinate role. It will govern where a party is not a subject of any country. *France*, App. Alger, June 7, 1906 (34 Clunet, 409); Trib. Civ. Seine, Feb. 14, 1908 (35 Clunet, 813). And never has been the subject of any country. *Germany*, article 29, Law Intr. Civ. Code.

In both France and Italy a domicile once acquired will continue until the acquisition of a new domicile. *France*, article 103, Civ. Code; Cass. March 24, 1896 (S. 1897, 1, 100); *Italy*, article 17, Civ. Code; Cass. Rome, March 17, 1893 (La Legge 1893, 1, 685). In Germany a domicile will be lost if it is given up animo et facto though no new domicile is acquired. A person may, therefore, be without a domicile. On the other hand, it is recognized that a person may have several domiciles. Section 7, Civ. Code.

If a party has neither a known nationality nor a known domicile, the territorial law will be applied. App. Pau, May 14, 1907 (34 Clunet, 1109).

FRENCH AUTHORIZED DOMICILE.—"A foreigner authorized by decree to establish his domicile in France shall enjoy all civil rights. The effect of such authorization shall cease after the expiration of five years if the foreigner does not apply for naturalization, or if such application be denied." Article 13, Civ. Code.

Consult, also, A. Chausse, Du rôle international du domicile, 24 Clunet, 5–31; and, as to nationality, see A. Weiss, Traité de droit international privé, vol. I.

Before the law of February 6, 1893, a married woman of French nationality though legally separated from her husband, could not, without his authorization, acquire a foreign nationality. Cass. March 18, 1878 (D. 1878, 1, 201)—Bauffremont Case.

DOMICILE AND TAXATION.—A personal tax may be assessed against a person at his domicile. Borland v. City of Boston, 132 Mass. 89, 42 Am. Rep. 424 (1882). The devolution of personal estate may be taxed, irrespective of the actual situs of such property in the jurisdiction where the deceased had his last domicile. In re Swift, 137 N. Y. 77, 32 N. E. 1096, 18 L. R. A. 709 (1893); Frothingham v. Shaw, 175 Mass. 59, 55 N. E. 623, 78 Am. St. Rep. 475 (1899). As to taxation of transfers inter vivos, see People v. Reardon, 184 N. Y. 431, 77 N. E. 970, 8 L. R. A. (N. S.) 314, 112 Am. St. Rep. 628 (1906), affirmed 204 U. S. 152, 27 Sup. Ct. 188, 51 L. Ed. 415 (1907).

CHAPTER VI.

CAPACITY.

SECTION 1.—NATURAL PERSONS.

ROSS v. ROSS (1880) 129 Mass. 243, 246, 37 Am. Rep. 321, Gray, C. J.: "It is a general principle that the status or condition of a person, the relation in which he stands to another person, and by which he is qualified or made capable to take certain rights in that other's property, is fixed by the law of the domicile, and that this status and capacity are to be recognized and upheld in every other state, so far as they are not inconsistent with its own laws and policy. Subject to this limitation, upon the death of any man, the status of those who claim succession or inheritance in his estate is to be ascertained by the law under which that status was acquired. His personal property is indeed to be distributed according to the law of his domicile at the time of his death, and his real estate descends according to the law of the place in which it is situated; but, in either case, it is according to those provisions of that law which regulate the succession or the inheritance of persons having such a status.

"The capacity or qualification to inherit or succeed to property, which is an incident of the status or condition, requiring no action to give it effect, is to be distinguished from the capacity or competency to enter into contracts that confer rights upon others. A capacity to take and have differs from a capacity to do and contract; in short, a capacity of holding from a capacity to act. Generally speaking, the validity of a personal contract, even as regards the capacity of the party to make it, as in the case of a married woman or an infant, is to be determined by the law of the state in which it is made. Milliken v. Pratt, 125 Mass. 374, 28 Am. Rep. 241, and authorities cited."

EXTRACT FROM FOOTE, PRIVATE INTERNATIONAL JURISPRUDENCE, 363, 366: "Capacity is obviously in theory a quality—one of those qualitates personales impressæ of which Huber speaks—and may be taken as equivalent to a legal power of doing an act which can admittedly be done by some persons. If the act to which the capacity is referred cannot legally be done at all, it is a misuse of words to speak of a legal capacity or incapacity to do it. Speak-

ing in this strict sense, capacity is only remarkable by its absence—it is invariably some incapacity that characterizes the exceptional case of which the law is called upon to take notice. Full capacity, in short, is the ordinary status or condition of mankind, which can never give rise to criticism or remark; and the only logical incapacities which exist in English law are those occasioned by infancy and insanity. A law which purports to impose a general incapacity does not impose an incapacity at all; it simply prohibits an act."

EXTRACTS FROM ARTICLE BY V. BAR ON THE CONFLICT OF LAWS IN V. HOLTZENDORFF'S ENCYCLOPÆDIE DER RECHTSWISSENSCHAFT (6th Ed. by J. Kohler) vol. II, 23–25: "Two attributes belong ordinarily to a person: (1) Capacity to acquire, to possess and to exercise rights, and (2) capacity to act with legal effect. Both attributes, capacity for rights (Rechtsfähigkeit) and capacity to act (Handlungsfähigkeit), or to use the more exact expression of the present German Civil Code—Geschäftsfähigkeit—since the capacity to commit a tort must be regarded from a different point of view—were included by Savigny, following the older theory, and are still included to a large extent in the foreign juristic literature, under the general name of status of the person; i. e., the condition (Zustand) and capacity of a person (état et capacité), which, in accordance with the nature of things and at the same time in conformity with the traditions on the continent of Europe, should be governed by the domestic law of such person (i. e., the lex domicilii, or the national law). This theory in regard to the status of a person, however, cannot be carried through. If, for example, in the native state of a person there are incapacities, based perhaps upon religious grounds, they cannot be given effect in a state where complete freedom in worship prevails. The logical effect of the statutory theory, which might show the incorrectness of the latter, is avoided by declaring that laws of this kind are imperative (Savigny) or are laws of public order, which have no effect beyond the territorial limits, but are absolutely binding within such territory.

"Restrictions on the capacity for rights, on the one hand, and restrictions on the capacity to act, on the other—for in the case of physical beings we are dealing really with restrictions imposed by law, full and unrestricted capacity being the rule—rest, however, upon entirely different legislative aims. If certain classes of persons are restricted in their capacity for rights, the intent is to discriminate against them; if their capacity to act is restricted the intention is protection—protection against the injurious consequences of their own will, easily misled because of insufficient understanding. This fundamental difference in aim requires, from an international standpoint, an entirely different treatment.

"1. The capacity for rights is to be governed by the law to which the transaction in question is subject in other respects. That is, the lex fori, contrary to Savigny's opinion, is not to be applied always, but the question, for example, whether somebody can acquire real estate is to be determined according to the lex rei sitæ, and the person who is a slave according to his home law is to be regarded as free so long as he stays with us and cannot be recovered by means of the rei vindicatio in accordance with his national law. * * *

"2. With respect to the laws restricting the capacity to act, on the other hand, it follows, from their aim to protect the person so restricted in his capacity, that such protection should find its limits at all events in what has seemed necessary by the law of the state of which the person in question is a subject. A more extended protection, which a person might enjoy in another state, would only cause confusion; e. g., where, state A would regard a person within its territory, who is a subject of state B and who is of age under the law of B, as a minor because he had not attained the age required for majority in state A. On the other hand, in the converse case, where a person not of age according to the law of his home state enters into legal transactions in a state in accordance with whose law he is of age, the nullity of the transaction does not necessarily follow. * * *

"It is immaterial whether the incapacity to act has been imposed by law directly or by the decree of a competent court. * * *"

NICHOLS & SHEPARD CO. v. MARSHALL.

(Supreme Court of Iowa, 1899. 108 Iowa, 518, 79 N. W. 282.)

DEEMER, J. Defendant is a married woman domiciled in this state. On or about the 9th day of July, 1894, she signed the note in suit, in the state of Indiana, at which place she was temporarily visiting, as surety for Milton W. Gregory. The note was made payable at the Indiana National Bank of Indianapolis. The laws of Indiana (section 6964, Burns' Rev. St.) provide that "a married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner; and such contract, as to her, shall be void." It is insisted on behalf of appellant that, as defendant was domiciled in this state at the time she made the note, her capacity to contract followed her into the state of Indiana, and validated her contract made in that commonwealth, and that the right of a married woman to make a contract relates to her contractual capacity, and, when given by the law of the domicile, follows the person. Our statutes permit the making of contracts of suretyship by married women, and, if appellant's postulate be correct, it follows that plaintiff is entitled to recover. The general rule seems to be, however, that the validity, nature, obligation, and interpretation of contracts are to be governed

by the lex loci contractus and actus. Savary v. Savary, 3 Iowa, 272; Boyd v. Ellis, 11 Iowa, 97; Arnold v. Potter, 22 Iowa, 194; McDaniel v. Chicago & N. W. Ry. Co., 24 Iowa, 417; Burrows v. Stryker, 47 Iowa, 477; Bigelow v. Burnham, 90 Iowa, 300, 57 N. W. 865, 48 Am. St. Rep. 442. The rule is also well settled that personal status is to be determined by the lex domicilii. Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321. Continental jurists have generally maintained that personal laws of the domicile, affecting the status and capacity of all inhabitants of a particular class, bind them, wherever they may go, and that the validity of all contracts, in so far as the capacity of the parties to contract is involved, depends upon the lex domicilii. Thus, the Code Napoléon enacts, "The laws concerning the status and capacity of persons govern Frenchmen even when residing in a foreign country." See, also, Story, Confl. Laws (8th Ed.) §§ 63–66; Whart. Confl. Laws (2d Ed.) § 114. Some of the English cases have also followed this rule. Guepratte v. Young, 4 De Gex & S. 217, 5 Eng. Ruling Cas. 848; Sottomayor v. De Barros, 47 Law J. Prob. 23, 5 Eng. Ruling Cas. 814. But see, apparently to the contrary, Burrows v. Jemino, 2 Strange, 733; Heriz v. De Casa Riera, 10 Law J. Ch. 47. We do not think the continental rule is applicable to our situation and condition. A state has the undoubted right to define the capacity or incapacity of its inhabitants, be they residents or temporary visitors; and in this country where travel is so common, and business has so little regard for state lines, it is more just, as well as more convenient, to have regard to the laws of the place of contract, as a uniform rule operating on all contracts, and which the contracting parties may be presumed to have had in contemplation when making their contracts, than to require them, at their peril, to know the domicile of those with whom they deal, and to ascertain the law of that domicile, however remote, which in many cases could not be done without such delay as would greatly cripple the power of contracting abroad at all. Indeed, it is a rule of almost universal application that the law of the state where the contract is made and where it is to be performed enters into, and becomes a part of, that contract, to the same extent and with the same effect as if written into the contract at length. Each state must prescribe for itself who of its residents have capacity to contract, and what changes shall be made, if any, in the disabilities imposed by the common law. Thus, in Thompson v. Ketchum, 8 Johns. 192, the note was made in Jamaica. The defense was infancy, according to the laws of New York. It was determined that the transaction was subject to the laws of the place of contract, and that infancy was a defense, or not, according to the laws of Jamaica. Mr. Justice Story, in his commentaries on Conflict of Laws, says: "In regard to questions of minority or majority, competency or incompetency to marry, incapacities incident to coverture, guardianship, emancipation, and other personal qualities and disabilities, the law of the domicile of birth, or the law of any other acquired and fixed domicile, is not generally to

govern, but the lex loci contractus aut actus, where the contract is made or the act done." Story, Confl. Laws, §§ 103, 241. See, also, 2 Kent, Comm. 233, note; Id. 458; Id. 459, note. It will be observed that Chancellor Kent, in some passages of his text, seems to incline to the civilian doctrine, yet the notes clearly indicate that he concurs with Justice Story. See further, on this subject, Story, Confl. Laws (4th Ed.) §§ 101, 102. The case of Pearl v. Hansborough, 9 Humph. (Tenn.) 426, is almost exactly in point. In that case a married woman, domiciled with her husband in the state of Mississippi, by the law of which a purchase by a married woman was valid, and the property purchased went to her separate use, bought personal property in Tennessee, by the law of which married women were incapable of contracting. The contract was held void and unenforceable in Tennessee. See, also, Male v. Roberts, 3 Esp. 163; Milliken v. Pratt, 125 Mass. 374, 28 Am. Rep. 241; Carey v. Mackey, 82 Me. 516, 20 Atl. 84, 9 L. R. A. 113, 17 Am. St. Rep. 500; Baum v. Birchall, 150 Pa. 164, 24 Atl. 620, 30 Am. St. Rep. 797; 2 Pars. Cont. (8th Ed.) *574, note; Id. *575–*578. Saul v. Creditors, 5 Mart. (N. S.) 569, 16 Am. Dec. 212, seems to be opposed to this rule. But as the case is from Louisiana, which state follows the civil law, it is not an authority. We may safely affirm, with Chancellor Kent, that while the continental jurists generally adopt the law of domicile, supposing it to come in conflict with the law of the place of contract, the English common law adopts the lex loci contractus. Lord Eldon, in Male v. Roberts, supra, said: "It appears from the evidence in this case that the cause of action arose in Scotland, and the contract must be therefore governed by the laws of that country, where the contract arises. Would infancy be a good defense by the laws of Scotland, had the action been commenced there? What the law of Scotland is with respect to the right of recovering against an infant for necessaries, I cannot say; but, if the law of Scotland is that such a contract as the present could not be enforced against an infant, that should have been given in evidence, and I hold myself not warranted in saying that such a contract is void by the law of Scotland because it is void by the law of England. The law of the country where the contract arose must govern the contract, and what that law is should be given in evidence to me as a fact. No such evidence has been given, and I cannot take the fact of what that law is without evidence." It would seem in this case, though not distinctly stated, that both parties were domiciled in England. The result of the application of these rules is that the contract was void where executed, and cannot be enforced by the courts of this state. Affirmed.[1]

[1] The law of the place of performance is of no effect upon the question of capacity. Garrigue v. Kellar, 164 Ind. 676, 74 N. E. 523, 69 L. R. A. 870, 108 Am. St. Rep. 324 (1905).

In Sottomayor v. De Barros, L. R. Prob. & Div. 1 (1877), it is said to be "a well-recognized principle of law" that the question of personal capacity to

THOMPSON v. TAYLOR.

(Court of Errors and Appeals of New Jersey, 1901. 66 N. J. Law, 253, 49 Atl. 544, 54 L. R. A. 585, 88 Am. St. Rep. 485.)

This action was brought in the circuit court upon a note, of which the following is a copy: "$422.29. Englewood, N. J., Oct. 10, 1898. Three months after date I promise to pay to the order of W. Bernard Taylor four hundred twenty-two $^{29}/_{100}$ dollars, at 44 Broad St., New York City; value received. Lillian B. Taylor."

Indorsed: "W. Bernard Taylor, 44 Broad St."

The note was signed by Lillian B. Taylor at the time and place of its date, she being then the wife of the payee. She signed it at her husband's request, and solely for his accommodation, and delivered it to him without any express limitation on the use he might make of it. The husband at once took the note to New York City, and there transferred it, with his indorsement, to the plaintiff, to take up two similar notes held by him, and then past due, aggregating, with interest, the amount of this note; which two notes the defendant had signed under the same circumstances, and which her husband had transferred to the plaintiff in the same manner for cash. The plaintiff knew that the payee and maker were husband and wife, but had no further notice, outside of the notes themselves, of the circumstances under which they had been signed.

The husband and wife have been during all the time above referred to, and still are, domiciled in New Jersey.

Since 1892 the statutes of New York have provided that "a married woman may contract with her husband or any other person, to the same extent, with the like effect, and in the same form as if unmarried, and she and her separate estate shall be liable thereon, whether such contract relates to her separate business or estate or otherwise, and in no case shall a charge upon her separate estate be necessary." Laws 1892, c. 594, § 1.

Deeming the case one of doubt and difficulty, the Bergen county circuit court certified the foregoing facts to the Supreme Court for its advisory opinion on the question whether, on those facts, the plaintiff is entitled to judgment against Lillian B. Taylor for the sum mentioned in the note and interest.

enter into a contract is to be determined by the law of domicile. This was obiter, however, since the point at issue related to the validity of a marriage.

"It has been doubted whether the personal competency or incompetency of an individual to contract depends on the law of the place where the contract is made or on the law of the place where the contracting party is domiciled. Perhaps in this country the question is not finally settled, though the preponderance of opinion here, as well as abroad, seems to be in favor of the law of the domicile. It may be that all cases are not to be governed by one and the same rule." Lord Macnaghten in Cooper v. Cooper, 13 App. Cas. 88, 108 (1888). Compare Ogden v. Ogden, [1908] P. (C. A.) 46.

The Supreme Court, after hearing argument, advised the circuit court that the plaintiff was not entitled to judgment against Lillian B. Taylor upon the note in suit. 65 N. J. Law, 107, 46 Atl. 567. Judgment in accordance with this advisory opinion was thereupon entered by the circuit court against the plaintiff, who, by writ of error, removed that judgment into this court.

GARRISON, J. The note in suit was not a New Jersey contract. The parties to it in this state were husband and wife. By force of section 14 of our married women's act, there is in this state no law to enable husband or wife to contract with each other, excepting as at common law. 2 Gen. St. p. 2015; Woodruff v. Clark, 42 N. J. Law, 198; Turner v. Davenport, 61 N. J. Eq. 18, 47 Atl. 766.

Hence the written promise of the wife to pay a sum of money to the order of her husband, signed by her and delivered to him in the state of New Jersey, did not constitute a contract. When, therefore, the note left this state no legal contract was in existence. National Bank of Rahway v. Brewster, 49 N. J. Law, 231, 12 Atl. 769. In New York the above-mentioned feature of the common-law rule has been expressly superseded by an enabling act that empowers a married woman to contract with her husband to the same extent and in the same form as if unmarried.

The husband, therefore, having in his possession, in the state of New York, his wife's note, intrusted to him under the circumstances certified in this case, had the means of making for her a contract of suretyship that would be valid by the law of the place where it came into legal existence and where it was to be performed. By his indorsement and delivery of the signed note, the wife was as effectually bound to the payee as if she had personally executed the note in the state of New York.

Where a note is signed in this state, but is passed away, and comes first into legal existence in the state of New York, in contemplation of law it was made in the latter jurisdiction. Campbell v. Nichols, 33 N. J. Law, 82. The note, therefore, is a contract made in the state of New York, upon the facts certified, without reference to the legal rule that a note made payable at a particular place is to be treated in all respects as if made at that place, for which abundant authority is cited in the brief of the plaintiff's counsel.

To the next proposition of the plaintiff, viz. that such a contract, made in New York, and valid by its laws, will be enforced by the courts of New Jersey, two objections are raised: First. That the incapacities of a wife under the common law, if not removed by the statute law of her domicile, follow her wherever she goes; so that, if at home she be unable to bind herself as surety, she may nowhere bind herself by such a contract. Secondly. That the retention in our law of so much of the common law as prevented married women from becoming sureties is a declaration by the Legislature of a public policy to which the courts should give effect by refusing to enforce obliga-

tions of this nature incurred by its citizens in other states where this disability no longer exists.

Both of these points are taken in the brief of counsel for the defendant, and each of them receives some support from the opinion delivered in the Supreme Court, although the actual decision of the case is rested upon the second ground, viz. that of public policy.

It will be necessary, therefore, to consider each of these propositions. The first claim is that the capacity of a married woman to make a contract of suretyship is governed by the law of her domicile, and not by the law of the place where the contract is made and where it is to be performed; in other words, that capacity to contract is governed by the law of domicile, and not by the lex loci contractus. The discussion of this question by the civilians and in early judicial writings occupied much space, and received the closest attention from Mr. Justice Story as one in which the doctrines of the civil law could not be made to harmonize with the commercial rule upon the subject. It is rarely worth while to search back of Story upon such a question, especially if he has decided against the civil-law rule. In his Commentaries upon the Conflict of Laws, after a comprehensive review of the authorities, Judge Story reached the conclusion that, in regard to the incapacities incident to coverture and other personal disabilities to contract, "the laws of the domicile of birth or the law of any other acquired and fixed domicile is not generally to govern, but the lex loci contractus aut actus—the law of the place where the contract is made or the act done." Story, Confl. Laws, § 103.

In the course of his consideration of this and kindred questions, Mr. Justice Story quotes so frequently from the civilians that upon a hasty reading, the opinions of those jurists may be taken for his own; but there can be no question as to the commentator's final summary, viz. that, "although foreign jurists generally hold that the law of the domicile ought to govern in regard to the capacity of persons to contract, yet the common law holds a different doctrine, namely, that the lex loci contractus is to govern." Story, Confl. Laws, § 241.

With respect to another American commentator—Chancellor Kent—it is both interesting and important to observe that while, in some parts of the text of his Commentaries, he seems to favor the arguments of the foreign jurists, yet in his later notes he unequivocally states the rule to be: "The state and condition of the person according to the law of his domicile will generally, though not universally, be regarded in other countries as to acts done, or rights acquired, or contracts made in the place of his native domicile; but as to acts, rights, or contracts done, acquired, or made out of his native domicile, the lex loci will generally govern with respect to his capacity and condition." 2 Kent, Comm. 233, note "c."

To the same effect is the opinion of Chief Justice Gray of Massachusetts delivered in the case of Milliken v. Pratt, 125 Mass. 374, 28 Am. Rep. 241, where, after considering the whole question, he decides

that "the validity of a contract, even as regards the capacity of the parties, is to be determined by the law of the state where it is made."

I have no difficulty in reaching the conclusion that the capacity of Mrs. Taylor to enter into a New York contract in New York was governed by the laws of New York, notwithstanding her domicile was in New Jersey; and that the contract into which she there entered was valid, and binding upon her.

If we pass to the reason assigned in the advisory opinion, we shall see that it rests upon the doctrine of our courts that a contract valid elsewhere will not be enforced if it is inconsistent with the public policy of the jurisdiction the aid of whose tribunals is invoked for the purpose of giving it effect.

The decisive portion of the opinion of Mr. Justice Gummere is in these words: "When the Legislature has declared the policy of the state in relation to a given subject-matter, it is the duty of the courts to give effect, so far as possible, to that policy"—citing Felt v. Felt, 59 N. J. Eq. 606, 45 Atl. 106, 49 Atl. 1071, 47 L. R. A. 546, 83 Am. St. Rep. 612, and Union Locomotive & Express Co. v. Erie Ry. Co., 37 N. J. Law, 23. There can be no doubt as to the duty of our courts under the condition thus predicated. The question in the case is whether the legislation referred to in the opinion is a declaration of public policy. Briefly summarized, that legislation confers upon married women rights to contract as if unmarried, save as to contracts of suretyship, from which no benefit is obtained for their separate use. 2 Gen. St. p. 2017, § 26.

In my judgment, this and kindred acts of legislation, constituting together our married women's act, and passed under the titles of "An act for the better securing of the property of married women," and "An act to amend the law relating to the property of married women," are to be regarded as regulations rendered necessary by the abrogation of the principles of the common law concerning coverture; and that what is indicated by this legislation as a whole is the abandonment of a public policy upon the subject, and the future regulation of it by acts of legislative discretion.

The distinction between regulative legislation and the adoption of a principle of public law is too important to be lost sight of. To declare, as the common law did, that the welfare of society required that wives be incapable of making contracts, is an illustration of the adoption of a principle which, so long as it was adhered to, constituted a rule of public policy. When, however, civilized states became satisfied that the welfare of society was not best served by the maintenance of this principle, it was abandoned by the recognition of its opposite, viz. that married women possessed capacity to contract. The questions that then arose, viz. what contracts might they make, and what might they not? while calling for the exercise of legislative discretion based upon considerations that affected a large class of individuals, did not, either in

theory or in fact, involve any principle upon which the general welfare of the body of citizens of the state was assumed to rest. With the abandonment of the political principle the matter was broken up into discretionary exercises of legislative regulation in the course of which different bodies, or the same legislative body at different periods, might lay down varying rules without destroying that comity that is so essential to commercial confidence and intercourse. Thus, in the case certified it appears that the state of New York, having abandoned the principles of the common law, as we ourselves have done, has gone further in its enabling legislation; or, what is the same thing, has retained less of what the common-law rule compelled; but equally and in either case the only principle involved has been abandoned. The respective regulations of the subject equally rest upon the common ground that women have a capacity to make contracts, subject to legislative control. If this be so, comity requires that we mutually give effect to these discretionary acts by recognizing the validity of the resulting contracts, and enforcing them in our courts, even when they are in opposition to our own declared discretion upon the subject. This, as I read the case of Wright v. Remington, 41 N. J. Law, 48, 32 Am. Rep. 180, has been categorically decided in our Supreme Court. In that case a wife signed two notes as surety for her husband in Illinois, where the common law had been abrogated to that extent. Suit was brought in our circuit court to enforce these contracts against the wife. Upon a case certified the Supreme Court held that comity required the enforcement of the notes in question.

In delivering the opinion of the court, Mr. Justice Reed said: "There can be no question but that the contract was valid by the law of Illinois. It is, therefore, the duty of the courts of this state to recognize and enforce it, unless it appears injurious to the interests of the state or of our citizens. But nothing approaching this result can be deduced solely from the fact that the foreign state confers upon married women the power to make a contract of suretyship. * * * Whatever may be our opinion of the policy of legislation beyond our state, we are bound by the principles of comity to recognize its validity, unless it clearly contravenes the principles of public morality, or attacks the interests of the body of the citizens of our state."

Objection upon this point was apparently not renewed upon the writ of error in this court, for the judgment was here affirmed without again referring to it. Remington v. Wright, 43 N. J. Law, 451.

This case, upon the point now in controversy, states the correct rule of law so definitely that it should have been followed in the Supreme Court.

If, as was suggested upon the argument, the device of providing a place of performance in a foreign jurisdiction, or even of making the actual contract in a place where the wife was empowered to contract directly with her husband, should be urged as a ground for sustaining such a contract here, or for enabling the husband to sue thereon in

our courts of law, a different question would be presented. It may well be that such a proceeding would run athwart the settled policy of our law with respect to the supervision exercised by equity over the engagements of married persons, which is retained in our system of jurisprudence by the fourteenth section of the married women's act. With respect to this question, no opinion is expressed.

For the reasons given, the judgment of the circuit court, entered in accordance with the advisory opinion of the Supreme Court is reversed.

MAGIE, Ch., and KRUEGER and VROOM, JJ., dissent.

1. Acc with J. v J. that place of del of note is place where law contd. ∴ note made in Tenn, but del in Ohio is under Ohio law.

FIRST NAT. BANK v. SHAW.

(Supreme Court of Tennessee, 1902. 109 Tenn. 237, 70 S. W. 807, 59 L. R. A. 498, 97 Am. St. Rep. 840.)

2. Contra J. v. J. ; for holds that he will not give effect to Ohio statutes as to its own laws.

Comment: Like result of other case below, but better reasoning of this case both: the latter denies general Rule of conflict of laws that right was acquired are enforceable anywhere.

McALISTER, J. The only question presented for determination upon this record is the liability of the defendant Mrs. Stella V. Harley upon the following note: "$500.00. Geneva, Ohio, Dec. 3, 1892. Six months after date, value received, we jointly and severally promise to pay to the First National Bank of Geneva, at their banking house, $500.00 interest 8% after maturity. Interest paid to maturity $17.50. D. H. Harley. Stella V. Harley. M. P. Shaw." Mrs. Harley, in her answer to the bill, avers that she was a married woman at the time said note was executed, and relies on the plea of coverture. She further avers that she and her husband, D. H. Harley, were residents of and living in the state of Tennessee at the time said note was executed, and had since continuously lived in this state, and she denies that the note was an Ohio contract.

The facts found by the Court of Chancery Appeals are, viz.: First. The note sued on is a renewal note. The original note was made June 6, 1891. It was renewed December 5, 1891; renewed again January 4, 1892; and again December 3, 1892; the note last renewed or made being the one in suit. Second. Previous to the execution of the first note, and since 1889, Mrs. Harley was a married woman, living with her husband continuously in Tennessee. She owned no property in the state of Ohio. Third. The weight of the proof is, and we so find as a fact, that she signed all the notes in Tennessee; and it is practically conceded, and, if not conceded, we find the fact to be, that she signed the note sued on in Tennessee. Fourth. The original note was negotiated in Geneva, Ohio. The note sued on was received by the bank at Geneva, Ohio, through the mail, from Chattanooga, Tenn. Fifth. It is conceded that, under the statute law of Ohio, married women are liable in that state on their contracts.

It will be perceived that the legal question presented is whether a married woman, domiciled with her husband in Tennessee, is liable on

a note signed by her in this state, but payable in the state of Ohio. The first question, of course, to be determined, is whether, upon the facts found, this is a Tennessee or an Ohio contract. Says Mr. Tiedeman, in his work on Commercial Paper (page 506): "It is not the law of the place where the contract was signed or executed, but the law of the place where the contract was consummated, by delivery or otherwise, which governs the construction of the contract made in one state, to be performed in another. Thus notes drawn in one state, and delivered and payable in another, for purchases made there, are governed by the law of the latter state, and are considered there made; for by delivery, only, the act of making is fully consummated." So it was said in Hall v. Cordell, 142 U. S. 116, 12 Sup. Ct. 154, 35 L. Ed. 956: "But where there is nothing to show that the parties had in view, in respect to the execution of the contract, any other law than the law of the place of performance, that law must determine the rights of the parties." Hubble v. Morristown Land & Improvement Co., 95 Tenn. 585, 32 S. W. 965. In 2 Pars. Cont. 586, it is said: "So if one in New York orders goods from Boston, either by carrier whom he points out, or in the usual course of trade, this would be a completion in the making of the contract, and it would be a Boston contract, whether he gave no note, or a note payable in Boston, or one without express place of payment." We think it quite plain that the note in suit is an Ohio contract, notwithstanding it was signed by Mrs. Harley in Tennessee, it having been delivered and consummated in Ohio, and is payable in that state, as the place of performance. Armstrong v. Best, 112 N. C. 59, 17 S. E. 14, 25 L. R. A. 188, 34 Am. St. Rep. 473; Milliken v. Pratt, 125 Mass. 374, 28 Am. Rep. 241.

The next inquiry is whether the plea of coverture to a note made in Ohio, valid and enforceable against a married woman in that state, is available in a suit on said note in this state, where such a contract is voidable at the election of the married woman. In Story, Confl. Laws, c. 4, § 103, it is said: "In regard to questions concerning infancy, competency to marry, incapacities incident to coverture, guardianship, and other personal qualities and disabilities, the law of the domicile of birth, or other fixed domicile, is not generally to govern, but the 'lex loci contractus aut actus,' the law of the place where the contract is made or the act done," or, as he elsewhere sums it up, "although foreign jurists generally hold that the law of the domicile ought to govern in regard to the capacity of persons to contract, yet the common law holds a different doctrine, namely, that the lex loci contractus is to govern." Story, Confl. Laws, §§ 103, 241. Chancellor Kent, while at one time inclined to the doctrine of the civilians, afterwards approved the doctrine which has just been quoted from Mr. Story. 2 Kent, Comm. 233, note, 458, 459, and note. The same doctrine was announced by this court in Pearl v. Hansborough, 9 Humph. 426, in an opinion by Judge Turley. Applying this rule, it was held in Milliken v. Pratt, 125 Mass. 374, 28 Am. Rep. 241 (Mr. Justice Gray de-

livering the opinion of the court), that a contract of guaranty, signed by a married woman, domiciled with her husband in Massachusetts, and sent by mail to Maine, where it was accepted and acted on, was a contract made in the state of Maine, and, when sued on in the state of Massachusetts, would be determined by the law of Maine. In that case it appeared that by the statutes of Maine, in force at the date of the contract of guaranty, the contracts of a married woman were valid and enforceable as if made by a feme sole, while the law of Massachusetts, as then existing, did not allow her to enter into a contract as surety or for the accommodation of her husband. But it further appeared that since the making of the contract sued on, and before the bringing of the action, the law of Massachusetts had been changed so as to enable married women to make such contracts. The court of Massachusetts therefore permitted a recovery against a married woman on the contract of guaranty made in Maine. See, also, Bell v. Packard, 69 Me. 105, 31 Am. Rep. 251. But in Tennessee the contracts of a married woman are voidable, and will not be enforced against her when there is a plea of coverture. It would be a strange anomaly to hold that such a contract made by a married woman in Tennessee would not be enforced by our courts, while the same contract, if made in another state, would be valid and enforceable. As stated by Mr. Justice Gray in Milliken v. Pratt, supra: "As the law of another state can neither operate nor be executed in this state by its own force, but only by the comity of this state, its operation and enforcement here may be restricted by positive prohibition of statute. * * * It is possible, also, that in a state where the common law prevailed in full force, by which a married woman was deemed incapable of binding herself by any contract whatever, it might be inferred that such utter incapacity, lasting throughout the joint lives of husband and wife, must be considered as so fixed by the settled policy of the state for the protection of its own citizens that it could not be held by the courts of that state to yield to the law of another state in which she might undertake to contract." While it is true, as contended by counsel in his very able argument, that the tendency of legislation in Tennessee is to enlarge the contractual power of married women, yet such power is very limited and circumscribed, and the settled policy of this state is to declare nugatory contracts made by her whenever her plea of coverture is interposed. In Bank of Columbia v. Walker, 14 Lea, 299, it was held that the lex loci contractus would govern when not repugnant to the lex fori. The court stated the rule to be: "Whether we consider the subject-matter under the head of comity and its rules, or under that of real and personal statutes and its rules, either or both sustain the position that the lex loci contractus as to relations and property rights will prevail over the lex fori, unless the enforcement of the former will work an injury to the subjects of the latter, or is prohibited by the laws of the latter." It was further said that rights and contracts arising under the laws of

a foreign state will not be enforced here, except under the doctrine of the comity of states, and that this doctrine neither requires nor sanctions the enforcement in the courts of this state of statutory rights and contracts arising under the laws of a foreign state which are repugnant to the policy and spirit of our laws.

For the reasons indicated, the decree of the Court of Chancery Appeals is affirmed.[2]

WOODWARD v. WOODWARD.

(Supreme Court of Tennessee, 1889. 87 Tenn. 644, 11 S. W. 802.)

FOLKES, J. This is a petition by Rosa P. Woodward, filed in the probate court of Shelby county, against her guardian, Emmet Woodward, in which she seeks to have a settlement of his guardian accounts, and to have the balance in his hands found due paid over to her. She alleges her domicile and residence in the state of Louisiana, and sets up and exhibits with her petition certified copies of the proceedings had in that state, whereby she has been emancipated from the disabilities of infancy, under and in pursuance of the statute of the state authorizing, in certain cases, the emancipation of persons who have attained the age of 18. The petition alleges that, in consequence of such decree, she is, under the laws of the state of Louisiana, of full age, and as such entitled to demand and receive her estate. It is shown that both her parents are dead; that her father died of yellow fever, intestate, in 1873, leaving several children, all of whom are now over 21 years of age except petitioner, and have received from their guardian their share of their father's estate; that defendant, Emmet Woodward, was appointed guardian for herself and brothers and sisters by the probate court of Shelby county shortly after her father's death; that there is now in his hands about $8,000 belonging to her, which he holds as such guardian; that shortly after her father's death, by proceedings duly had in the probate court of Shelby county, petitioner was adopted by C. Dickman, the husband of her maternal aunt, under and in pursuance of the statutes of Tennessee in such cases made and provided; that such adoption was with the consent and approval of the defendant, Emmet Woodward, her regular guardian; that several years thereafter C. Dickman removed from the state of Tennessee to the state of Louisiana with the view of taking up his permanent abode there, and has ever since resided and still does reside there,

[2]Accord: Armstrong v. Best, 112 N. C. 59, 17 S. E. 14, 25 L. R. A. 188, 34 Am. St. Rep. 473 (1893). See Freeman's Appeal, 68 Conn. 533, 37 Atl. 420, 37 L. R. A. 452, 57 Am. St. Rep. 112 (1897).

Concerning capacity of married women to contract, see 57 L. R. A. 513–527; and concerning rights and obligations of married women, consult 85 Am. St. Rep. 552–578.

the state of Louisiana being the state of his domicile; that petitioner, after her adoption, became a member of the family of C. Dickman, her adoptive father, and did remove with him and his family to the state of Louisiana, and has ever since resided there; that Louisiana is the state of her domicile, and was at the time of the judicial proceedings therein resulting in her emancipation. She alleges in her petition that it is her desire, and to her interest, to have and receive the estate coming to her from her said father as aforesaid, by reason of the fact that it is now in the hands of her guardian, only yielding her a revenue of 6 per cent., charged with the commissions, expenses, and costs incident to such guardianship, while she can readily obtain a permanent 8 per cent. investment of her funds in the state of Louisiana, where that rate of interest is legal, freed from costs and expenses of guardianship. She insists that the state of Tennessee will recognize her majority as determined and fixed by judicial decree in the state of her domicile, and would recognize as valid any receipt, discharge, or acquittance that she might execute to her guardian for her estate now in his hands, and that the probate court will order and direct a settlement of accounts, and the paying over to her the balance found to be due, so that the said guardian, and his sureties on his official bond, may be discharged from all further liability.

To this petition the defendant interposed a demurrer, upon the ground that petitioner was still a minor under 21 years of age; that the proceedings had in the courts of Louisiana would have no extraterritorial effect by reason of the want of jurisdiction in said courts over the estate of the ward situated in Tennessee; that the proceedings had in Louisiana are unknown to the laws of Tennessee, and opposed to the policy of Tennessee law, and contrary to the interests of the citizens of Tennessee, and would therefore not be recognized in the courts of this state; that the said guardian is lawfully in possession of said funds under the laws of this state, and has been guilty of no breach of duty in relation thereto; and that said petitioner, being a minor, cannot maintain this action in her own name.

The probate judge sustained the demurrer, and dismissed the petition. Petitioner has filed the record for a writ of error in this court.

There are certain general principles which control the disposition of this case. They are, in the main, well settled; the difficulty lies in their application to the particular facts of the case in hand. It is elementary that "every state has an undoubted right to determine the status, or domestic or social condition, of persons domiciled within its territory, except in so far as the powers in this respect are restrained by duties or obligations imposed upon them by the constitution of the United States." Strader v. Graham, 10 How. (U. S.) 93, 13 L. Ed. 337. Again, the civil status is governed universally by one single principle, namely, that of domicile, which is the criterion established by law for the purpose of determining the civil status; for it is on this basis that the personal rights of a party—that is to say, the law which determines

his majority or minority, his marriage, succession, testacy, and intestacy—must depend. Udny v. Udny, L. R. 1 H. L. Sc. 457.

It is not seriously controverted by counsel for defendant that the judicial decree under which the disabilities of minority were removed in Louisiana had the same effect as though, by direct statute, the age of majority had been fixed at 18, so far as the status of minors domiciled in that state is concerned; the main contention in this connection being that, the domicile or origin of petitioner having been in Tennessee, petitioner has acquired, and could acquire, no domicile in Louisiana by reason of her removal to that state by her adoptive father.

Before considering the question of removal, and of the right of the adoptive father to acquire for his adopted child a new domicile, or, what is the same thing, the right or privilege of the adopted child to acquire a new domicile with her adoptive father, let us settle, if we can, what would be the proper disposition of the case had the petitioner been born, and ever after domiciled, in the state of Louisiana. In such cases we regard it as well settled that, under unquestionable principles of private international law, one state will recognize and give force and effect in its own tribunals to the legislation of another state in so far as it fixes the status and capacity of married women and minors. This is frequently spoken of as a principle of comity, and, while it doubtless has its origin in considerations of comity, it has been so repeatedly and emphatically recognized by the courts of all civilized countries that it is now thoroughly crystallized into rules and principles of private international law. As is said in Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321, in the elaborate discussion of the subject by Chief Justice Gray: "The status or condition of any person with the inherent capacity of succession or inheritance, is to be ascertained by the law of the domicile which creates the status, at least when the status is one which may exist under the laws of the state in which it is called in question, and when there is nothing in those laws to prohibit giving full effect to the status and capacity acquired in the state of the domicile. We are not aware of any case, in England or America, in which a change of status in the country of the domicile, with the formalities prescribed by its laws, has not been allowed full effect, as to the capacity thereby created, of succeeding to and inheriting property in any other country the laws of which allow a like change of status in a like manner, with a like effect, under like circumstances." This principle is illustrated by the decree made in Re Da Cunha, 1 Hagg. Ecc. 237, where administration was granted in England, limited to the receipt of the dividend of a sum of English stock to a Portuguese lady, who, by the laws of her domicile, was emancipated from the disabilities of minority, but was, by the English law, still a minor. It was held that she was entitled to receive and receipt for the dividend on said stock in England.

It is true, as insisted by counsel for defendant, that there is no elaboration of decision and of discussion made by the judges in the disposition of this case; but this fact in no manner detracts from its force and effect as authority. It does settle and determine that a person of full age by the law of her domicile, though a minor by the laws of England, is entitled to receive and give a valid acquittance for property to which she is entitled in England; and such receipt, though confined to the dividend on the stock, is as conclusive of her right to act as a major as though she had received the corpus of the property; the dividend being all that she was, under the circumstances, entitled to. In rule 32 of Dicey we find it stated that the capacity of a person for the alienation of movables depends, so far as the question of infancy or majority is concerned, on the law of that person's domicile. So in Re Hellmann's Will (reported in L. R. 2 Eq. 363), Lord Romilly, the Master of the Rolls, authorized the payment of a legacy to a minor aged 18, because she was of age according to the laws of Hamburg, where she was domiciled. The case is stated thus: "Hellmann, being domiciled in England, by his will bequeathed the sum of £250 to each of the two children of Charlatt Helsig. These children were a daughter aged 18, and a son aged 17, both residents and domiciled in Hamburg. According to the law of Hamburg girls become of age on completing their eighteenth year; boys on completing their twenty-second." The Master of the Rolls said: "I am of opinion that the legacy to the daughter, who is of age according to the law of Hamburg, may be paid on her receipt. The legacy to the son may be paid on his attaining full age according to English law, or according to the law of Hamburg, whichever first happens."

It is suggested, however, in response to this case, that the fact that the property going to the minor was, by the will, given to the minor by name, is indicative of the purpose to have the same paid over to the minor according to the law of the place of her domicile, where her majority was reached at an earlier age than in England, and that for this reason it should not be controlling in a case where the property was inherited generally, in one state, where 21 is the lawful age, and the full age at an earlier period is had by reason of the domicile in another state.

We cannot appreciate the force of this suggestion. The court, in disposing of the case, indicates in no wise that its judgment or conclusion was influenced by any such consideration, and, so far as the case goes, it is merely an announcement and application of the general principles contended for by petitioner. Had any special regard been given to the fact that property was devised by will, instead of passing by law, it would have been more reasonable to have supposed that the testator intended it to be paid over according to the law of his own domicile, requiring guardians to receive and receipt for the fund devised to minors. That the court gave no attention to such considerations is shown by the order made with reference to the boy, in directing that the fund

should be paid to him when he attained his majority either under the law of England or under the law of his domicile, whichever first happened. This court has recognized the doctrine contended for by petitioner in the case of Roberson v. Queen, decided at Nashville, and reported in 87 Tenn. 445, 11 S. W. 38, 3 L. R. A. 214, 10 Am. St. Rep. 690, where it is held that the judicial proceedings, under the laws of the state of Kentucky, emancipating married women from the disability of coverture, would be recognized and enforced in this state to the extent of allowing an action to be brought and maintained in the courts of this state against such married woman, on a note made by her in the state of Kentucky as surety for her husband, clearly recognizing that her status as a person sui juris, fixed by judicial proceedings in the state of her domicile, would have full force and effect in this state. To the same effect is the text in Wharton's Conflict of Laws (section 114), where the learned author says: "A foreigner who is capable of business at his domicile must be recognized as so capable by our laws, even though, if domiciled among us, he would be incapable."

A near analogy to the present case, with reference to the recognition in one state of the status fixed by the law of the domicile, is to be found in the case of children born out of wedlock, but made legitimate afterwards, according to the laws of their domicile, by the subsequent marriage of their parents. They are deemed everywhere legitimate for the purposes of inheritance, etc. Andros v. Andros, L. R. 24 Ch. Div. 637; Miller v. Miller, 91 N. Y. 315, 43 Am. Rep. 669; Scott v. Key, 11 La. Ann. 232. This doctrine is generally subject to exception concerning real estate, which is governed by the lex rei sitæ. The law of divorce also furnishes a close analogy. Thus a divorce, in a foreign jurisdiction, for a cause which is not competent in the state of marriage, is recognized as valid in the latter if the former had jurisdiction of the parties, for the purposes of the suit. Sewall v. Sewall, 122 Mass. 158, 23 Am. Rep. 299; Clark v. Clark, 8 Cush. (Mass.) 385; Barber v. Root, 10 Mass. 260. In Stephens v. McFarland, 8 Ir. Eq. 444, we have a case where a minor was insolvent in South Australia, by the laws of which a minor could be so adjudged. His assignee attempted in Ireland to obtain the real and personal property that passed to him under his father's will. The bill was demurred to, and the demurrer overruled; the assignee being adjudged to have the title of the property coming to the insolvent minor.

The converse of the present case is found in Kohne's Estate, 1 Pars. Eq. Cas. (Pa.) 399. The direct point was that the power of attorney of a minor, who had not reached her majority by the law of her domicile, would not be recognized in Pennsylvania, although, by the law of Pennsylvania, she was then of full age. The judge delivering the opinion said, among other things, "that, according to our law, in common with those of the civilized world, questions of minority and majority in all controversies respecting personal estate are to be determined according to the laws of the country in which the alleged mi-

An absurd case
Here a man,
of capacity in Pa.
re land in Pa
gave power to
atty. to be
executed in Pa.
Held: By a Pa. Ct.
that because the
man was under
age in Prussia
where he lived
∴ power was
invalid.

nor held his actual domicile, whether natural or acquired." See Story, Confl. Laws, §§ 64–66, 69. Pothier states the rule thus: "The change of domicile delivers persons from the empire of the laws of the place they have quitted, and subjects them to those of the new domicile they have acquired." Poth. Cout. d'Orléans, c. 1, art. 1, note 13. Mr. Justice Story, after presenting the several views of some of the civil law writers who discuss the subject, says, at section 71: "Boullenois, himself, does not hesitate to declare the general principle to be incontestable that the law of the actual domicile decides the state and condition of the person, so that a person, by changing his domicile, changes at the same time his condition." The effect of the statute of Louisiana, under which the disabilities of this minor were removed, has been adjudged by the highest court of that state. Thus, in Proctor v. Hebert, 36 La. Ann. 250, it is said: "It places the minor, thus freed, on the same plane with the major, and invests him with identically the same rights, and subject to equal responsibilities. In other words, instead of leaving him subject to the operation of the general law, and making him wait until he is twenty-one years of age, it virtually and in effect fixed and established his majority at an earlier period of life—that is, at any time when he shall have passed the age of eighteen years." So fully is his majority established that he is capable of filling the office of administrator, just as if 21 years of age. Succession of Lyne, 12 La. Ann. 155. Under this legislative emancipation the party's disabilities of infancy are all removed. Wilson v. Craighead, 6 Rob. (La.) 429; Succession of Lyne, 12 La. Ann. 155; Proctor v. Hebert, 36 La. Ann. 250. He is estopped by it, and those dealing with him need look no further than his free papers. Allison v. Watson, 36 La. Ann. 616. The case of State, to Use of Gilbreath v. Bunce, 65 Mo. 349, urged by counsel for defendant as furnishing strong authority for their contention here, is not, in our opinion, entitled to the weight insisted upon. The case is extremely brief in its discussion, and assumes the very point in controversy, without reference to the various authorities bearing thereon. Mr. Wharton, in his work on Conflict of Laws, at section 114, says of this case that it is "exceptional" and "arbitrary"; moreover, it may be distinguished from the case now before us in this, that the proceedings in Arkansas, the state of domicile of the minor, seems to have had for its object the emancipation of the minor only pro tanto—that is to say, the minor's disabilities were removed to the extent of authorizing him to go into the state of Missouri, and there collect and receipt for the particular fund in the hands of his Missouri guardian. It was not an out and out removal of all the disabilities of minority, but a special commission, authorizing an incursion into the state of Missouri for the purpose of receiving and receipting for a particular fund.

The Arkansas statute is not before us, and we only know its contents by the statement thereof, found in this Missouri case, from which it is apparent that it differs widely from the broad and comprehensive

proceedings in Louisiana, whereby the petitioner in the case at bar was thoroughly and entirely emancipated from all disabilities, and her status fixed as a major in Louisiana, from which she claims the right to have her status recognized in other sovereignties.

So far we have traveled a broad and well-defined road, from which there is no variableness nor shadow of turning, every step of which is marked by well-considered authority of the highest repute.

[The learned justice here discussed the question of petitioner's domicile and concluded that it was in Louisiana at the time of the judicial proceedings therein resulting in her emancipation.]

With the question of change of domicile settled, we, upon authority and principle, hold that she has the right to receive from her guardian in the state of Tennessee funds coming to her in consequence of her majority by the law of her domicile. In this connection it may be remembered that a capacity to take and to have differs from a capacity to do and contract; in short, "a capacity to hold, from a capacity to act," as was said by Mr. Chief Justice Gray in the case of Ross v. Ross, supra.

We do not understand that, with the matter of removal and adoption out of the way, there is any serious question that a person of full age in Louisiana could receive and receipt for property belonging to such minor in this state. The receipt in such case, accompanied with a discharge, is a contract. There are any number of cases holding that persons who are of full age by the law of their domicile will be held bound by any contracts made by them in another state, where they would not otherwise be of age under the laws of such other state. It is true that it has been held that, where persons are of age in the state where they make a contract, though not of full age in the state of their domicile, they will be held bound by their contracts in the state where the contracts were made. This apparent exception to the general rule that the law of domicile fixes capacity is predicated upon the idea that every state must protect its own citizens from the wrongful acts of the subjects of other states; and, while it will always recognize capacity, as furnished by the law of domicile, it will not always recognize incapacity where the person is capable, under the law of the state where the contract is made, where it would affect injuriously our own citizens. Authorities upon this aspect of the case might be multiplied, but the law, as here stated, is too well settled to render such citations necessary.

It only remains to determine whether there is anything in the statutes of this state requiring guardians to hold funds in their hands until the ward attains 21 years of age that militates against the enforcement of the conclusions we have already reached. On behalf of the defendant it is insisted that the language of the statute in the regard above mentioned is as imperative as would be a provision in the will, or other instrument creating an estate, wherein it was directed that the trustees should hold the fund until the beneficiary

should attain the age of 21 years. It would be competent for the legislature to pass an act impressing such a trust upon funds in this state, without regard to the laws of the state of the domicile of the ward. But does the statute in question do more than provide for wards domiciled in our own state? Is it aimed at non-resident wards? We do not so read nor understand our statute. We consider that the reference to the age of 21 years is for Tennessee wards, and is not for the purpose of fixing arbitrarily that particular age at which the guardian shall settle with wards domiciled in other states, but that it uses that age in consequence merely of the fact that, under the law of this state, a party is a minor until that age is attained, and that the statute, therefore, must be read as though it had merely provided that the guardian should settle when the ward attained his majority. The statute referred to by counsel for defendant as fixing the age of 21 as the earliest period at which a Tennessee guardian can be called on to settle does not declare a trust in the hands of all guardians until the ward attains 21, as is argued. This statute is to be found at section 3419, and is as follows: "Every minor, upon attaining the age of twenty-one years, and every female ward when she is married, upon the receipt of money or estate due either, shall receipt the guardian for the same in the same manner as legatees, distributees, or others interested in the distribution of estates." The next section provides for the keeping by the clerks of the county court of well-bound books in which such receipts shall be recorded. These are the only sections in article 9, c. 2, of the Code. The title of the article is "Ward's Receipt on Coming of Age or Marriage." Here is certainly nothing showing an imperative policy or any other policy that this state proposes to set up for guardians in this state as to funds in their hands belonging to wards everywhere. It is merely a provision aimed at and operating upon the ward, requiring him to give a receipt "on coming of age," "or marriage," and providing for the recording of such receipt. The word "twenty-one" happens to be used in the statute merely because that is the age of majority at common law, which is the law of this state on that subject, there being no statute declaring it; and the word "twenty-one" is used as synonymous with "full age" or "coming of age," as shown by the title to the article, and, as is further shown by section 3358, under the same chapter, the title to which is "Guardian and Ward," and article 1, the title of which is "Who may be Guardian," where it enacts that such person, who fails to deliver up effects of the ward "upon majority or marriage," is guilty of a misdemeanor; showing that the terms are used convertibly. This is too plain for citation of authority or rules of construction, but it happens that in Re Kohne's Estate, 1 Pars. Eq. Cas. 399, we have an adjudication that the terms "arrival at twenty-one years" and "arrival at full age" are synonymous, and convey to the mind identically the same idea. So that there is nothing in our statute fixing 21 years as the age at which a guard-

ian shall settle with wards who are of full age in the state of their domicile. The only provisions on the subject are the two referred to, to wit: that the ward, on coming of age, shall give a receipt, and that if a guardian fails to turn over property to his ward at his "majority" or "her marriage," he is guilty of a misdemeanor. So that under our law he is required to settle when the ward is of full age, and, under the jus gentium, the petitioner is of full age and he must settle. The enforcement of this rule of private international law only requires that the common-law age of majority of this state shall give way to the age of majority as fixed by the law of the domicile of the ward, unless there be something in our statutes or decisions which are to be understood as indicative of a policy or purpose to enforce the particular law, without regard to the rules of private international law which asks its suspension in favor of the lex domicilli.

There is nothing in our law on the subject in hand upon which can be predicated the demand that the jus gentium, shall not prevail. Under the view we take of the law governing this case, the petitioner has attained her majority under the laws of the state of her domicile, and this court, recognizing the status of capacity as thus fixed by the law of her domicile, will declare her of full age, so far as her right to demand and receive from any one having property in their possession belonging to her, to which she would be entitled upon attaining full age in this state. In other words, being of full age in Louisiana, the state of her domicile, she is of full age in this state, under the principles of private international law obtaining in such cases.

Let the judgment be reversed, and the case remanded for further proceedings.[3]

[3]Accord: Hiestand v. Kuns, 8 Blackf. (Ind.) 345, 46 Am. Dec. 481 (1847). The domicile of origin was applied in Barrera v. Alpuente, 6 Mart. (N. S.) 69, 17 Am. Dec. 179 (1827). For the purpose of the statute of limitations, majority has been determined with reference to the lex fori. Burgett v. Williford, 56 Ark. 187, 19 S. W. 750, 35 Am. St. Rep. 96 (1892).

The substantive law applicable to the right in question will determine capacity for rights. Christopher v. Norvell, 201 U. S. 216, 26 Sup. Ct. 502, 50 L. Ed. 732 (1906) capacity to become a shareholder in a corporation; Schluter v. Bowery Sav. Bank, 117 N. Y. 125, 22 N. E. 572, 5 L. R. A. 541, 15 Am. St. Rep. 494 (1889), capacity to be a trustee. And the power of disposition over certain rights. First Nat. Bank v. National Broadway Bank, 156 N. Y. 459, 51 N. E. 398, 42 L. R. A. 139 (1898).

A disability imposed by way of penalty has no extraterritorial effect. Commonwealth v. Green, 17 Mass. 515 (1822). Nor a so-called "artificial incapacity" resulting from the judgment of a court. Gates v. Bingham, 49 Conn. 275 (1881); Worms v. De Valdor, 49 L. J. Ch. N. S. 261 (1880); In re Selot's Trusts, [1902] 1 Ch. 488. Contra: *France*, Trib. Seine, Jan. 19, 1889 (17 Clunet, 870); Comp. App. Lyon, April 30, 1907 (4 Darras, 630).

CONTINENTAL LAW.—The national law of the parties governs with respect to capacity to act. *France*, article 3, Civ. Code; Trib. Tunis, Jan. 25, 1906 (35 Clunet, 161). *Italy*, article 6, Civ. Code. See art. 58, Com. Code. *Germany*, article 7, Law Intr. Civ. Code. A foreigner who, after reaching the age of majority, acquires the German nationality, will retain the status of a major, though he would not be of age under the German municipal law. Article 7, Law Intr. Civ. Code.

In France the lex loci has been substituted for the national law where the foreigner concealed his nationality. App. Paris, Feb. 8, 1883 (S. 1883,

SELL v. MILLER.

(Supreme Court of Ohio, 1860. 11 Ohio St. 331.)

BY THE COURT. Where a married woman, over eighteen but under twenty-one years of age, has her domicile, and joins with her husband in the execution of a mortgage, within a foreign jurisdiction, where the age of majority is fixed at twenty-one years, upon real estate situate in Ohio, held, that such morgage is not invalid for want of capacity on her part to contract; the capacity to contract, in respect to immovables, being governed by the law of the situs, and not by the law of the domicile.

Motion overruled.[4]

AUGUSTA INS. & BANKING CO. v. MORTON.

(Supreme Court of Louisiana, 1848. 3 La. Ann. 417.)

EUSTIS, C. J. This suit was instituted on two promissory notes, executed by the defendant and his wife, jointly, and secured by mortgage on immovable property situated in Louisiana. The defendants were domiciliated in Maryland, where they continued to reside. The suit against them was commenced by attachment, under which the mortgaged property was attached. There was judgment against the defendants with privilege of mortgage on the property attached, and they have appealed.

The appellants have contended before us in argument: (1) That no property of the husband having been attached, no judgment could be lawfully rendered against him. (2) That Mrs. Morton, having bound her property and not herself personally, judgment could not be rendered against her, but only against her property. (3) That a married woman cannot bind her immovable property in this state as surety for her husband's debts; and that the mortgage being invalid, no judgment should have been rendered against her property.

The first proposition is certainly tenable. No property of the husband having been attached, no judgment can be rendered against him. His appearance in court by a curator must be only considered as assisting his wife in the proceedings.

It is established that a married woman in Maryland, where these

2, 169). Or where the other contracting party was ignorant of his nationality. Cass. Jan. 16, 1861 (D. 1861, 1, 193); App. Bordeaux, April 11, 1906 (33 Clunet, 1119); App. Lyon, April 30, 1907 (35 Clunet, 146). And in Germany a foreigner will be held liable with respect to all legal transactions entered into in Germany other than those relating to foreign realty or those falling within the family law or the law of succession, if he has capacity according to German law. Article 7, Law Intr. Civ. Code. See, also, article 84, Bills of Exchange Act.

[4] This doctrine was already taught by the Dutch jurist, Paul Voet, De Statutis, p. 138.

contracts were made, may become responsible for the debts of her husband, so as to bind property settled on her for her separate use, but not so as to bind herself personally; and hence it is inferred that no judgment could be rendered against her personally.

The question as to the validity of the mortgage granted by Mrs. Morton to secure the debt of her husband controls the case, and reduces the point raised as to the personal effect of the judgment to a mere matter of form.

The district judge thought that the ground on which the mortgage was attempted to be invalidated was a matter of personal disability, and depended exclusively on the law of the domicile of the party granting it. The argument before us has been principally directed to this question, whether the validity of the mortgage is to be tested by the laws of this state, or those of Maryland.

The article of the Code which provides that the wife cannot bind herself for the debts of her husband, according to the doctrine of the civilians, is a personal statute. It is founded exclusively on the personal relation between husband and wife, resulting from marriage under our laws, and of course is confined in its operation to married persons within our jurisdiction. True, it establishes an incapacity to contract, but this incapacity is merely relative, and it is settled by our jurisprudence that a wife cannot be relieved from the effect of a contract by which she became the surety for her husband, if the debt itself inured to her benefit. The disability to contract exists only in a certain contingency, and that contingency is strictly personal. The incapacity of a married woman to contract is of the same character as that of a minor, and the laws creating those incapacities have always been classed among those which are called personal. This article does not even purport to affect the immovable property of married women. Its operation upon such property is only indirect, as all property is affected by laws relating to contracts. It renders voidable contracts made by married women in certain cases, by reason of the consideration which it holds to be in conflict with the relations of husband and wife. It has no one characteristic of what is considered in jurisprudence as a real statute. Those laws are real, in contradistinction to personal statutes, which regulate directly property, without reference to the condition or the capacity of its possessor. The distinction between these classes of laws, though their application is in many cases difficult, appears to us to be obvious. 1 Duranton, §§ 79, 80.

The contract entered into in the present instance bound the property of the wife under the law of Maryland, where the contract was made, and where the husband and wife are domiciliated. The act of mortgage is valid in point of form. The property mortgaged was not dotal, and she would have had a right to sell or mortgage it, with the consent of her husband, in all but certain excepted cases, if her domicile had been in Louisiana. If there be no objection to the validity of this mortgage except that resulting from her incapacity as a married woman,

we find no just ground for declaring it to be invalid. It conflicts with no law of the State, and there is no reason of comity which would authorize a court in Louisiana to relieve the wife from its effect. It interferes with no real statute; and the personal statute does not reach it, by reason of the person not being subject to our jurisdiction and unaffected by our laws.

Suppose that by the laws of Maryland the age of twenty years was fixed as that of majority, and a person domiciliated in that state, above that age and not twenty-one years old, should sell real estate in Louisiana, he could not be aided by our courts in setting aside the sale afterwards on the ground of his minority. The answer to such a pretension would be, as in this case. The disability resulting from the condition of persons is personal, and contracts valid at the place of domicile, are valid without reference to the situation of the property, so far as the capacity of the party to contract is concerned. Merlin, Rep. verbis Statut, Majorité, Autorisation maritale; Sirey, Rep. 19, 2, 140, case of Morris; Traité des Personnes, par Proudhon, c. 5, § 1; Merchants' Bank of Baltimore v. Bank of United States, 2 La. Ann. 659.

We have examined with care the authorities cited in the learned argument, submitted by the counsel for the defendants. A review of them in detail would extend our observations beyond the length to be observed in judicial opinions. The counsel contends that the law of Maryland, by which a married woman, though generally incapacitated to make contracts, is enabled to bind her property for her husband's debts, is a real statute, and applies to property exclusively within the jurisdiction of that state. But we understand the right of the wife to bind her separate property for her husband to be founded on a rule of equity, which regards her as a feme sole in all cases in which she, without any fraud or unfair advantage, and with a clear intention of affecting her separate property, enters into an agreement respecting it; and this view, which a court of equity enforces in relation to her separate property, is independent of its character and situs, and removes every disability in respect to it, so far as a court of equity is called to act upon it.

It is not pretended that our conclusions on this question harmonize with all that has been written or decided on this difficult subject; but our aim has been to adopt none which from their generality would conflict with any recognized principle of jurisprudence, and we think we can safely rest the decision of the case on the authority of Merlin and Pothier. Merlin verbo Senatus-consult. Vell. Pothier, Ob. 389.

It is therefore ordered that the judgment of the district court be reversed, and that the plaintiffs recover judgment against the defendant Mary Ann Morton, wife of George C. Morton, to be paid exclusively out of the property mortgaged, for the sum of $24,824.82, with interest at six per cent. per annum on $12,234.22 from 6th March, 1843, and on the balance, $12,590.59, from 6th September, 1843, and that the property and rights attached in this suit, and described in the act

of mortgage on file therein, be sold by the sheriff in satisfaction of this judgment, with costs of the court below; the plaintiffs to pay the costs of this appeal.

THOMSON v. KYLE.

(Supreme Court of Florida, 1897. 39 Fla. 582, 23 South. 12, 63 Am. St. Rep. 193.)

Bill by J. C. Kyle against Della K. Thomson and another to foreclose a mortgage. Decree of foreclosure granted, and a money decree for deficiency rendered against defendant John M. Thomson. Defendants appeal. The appellee (complainant below), on November 14, 1891, filed a bill in equity in the circuit court of Alachua county, praying foreclosure of a mortgage on certain real estate situated in that county. The mortgage debt was evidenced by a note executed by the appellants (defendants below) to complainant, under date January 18, 1890, for $2,932, due April 10, 1890, and payable in the city of Birmingham, Ala. The mortgage given to secure this note was executed on the same day by the defendants. The defendant Della K. Thomson filed her plea on January 4, 1892, whereby she alleged that prior and subsequent to, and at the time of, the execution of the note and mortgage, she was a married woman, the wife of her co-defendant, and seised and possessed of a statutory separate estate in her own individual right and control, part of which was embraced in the mortgage; that the note and mortgage were executed in the state of Alabama, and that all transactions out of which the mortgage debt arose occurred in said state; that the mortgage debt was the debt of her husband exclusively, and she executed the note and mortgage as security only, and upon no other consideration; that by the laws of Alabama the obligation of a married woman executed for her husband's debt was null and void, and incapable of enforcement, and that the note and mortgage, being void as to her in the state of Alabama, were likewise void in the state of Florida. This plea was, upon argument, overruled.*

CARTER, J.[5] The question presented by the plea of Della K. Thomson is an interesting one, and one upon which the authorities are not in entire accord. It is not denied by appellants that, had the mortgage sought to be foreclosed in this case been executed in this state, it would have been valid, and enforceable under our laws. Indeed, it has been held by this court, on more than one occasion, that a mortgage properly executed by a married woman and her husband, conveying the wife's separate statutory real estate as security for her husband's debt, is valid. Dzialynski v. Bank of Jacksonville, 23 Fla. 346, 2 South. 696; Ballard v. Lippman, 32 Fla. 481, 14 South. 154. It is insisted, how-

*Statement of facts taken from 23 South. 12.

[5] Only so much of the opinion is given as relates to the issue of capacity.

ever, that under the laws of Alabama a married woman is without capacity to bind herself or her property as security for the debt of her husband, and, as the mortgage sought to be enforced in this case was executed, and the debt secured thereby was payable, in that state, and all the parties were there domiciled, that those laws necessarily entered into and became a part of the contract, rendering it void in that state; and that, being void in Alabama, it is, by virtue of interstate law, void in Florida. It may be admitted that this argument has strong application to the note executed by Mrs. Thomson with her husband, which the mortgage was given to secure, for, the note being a general personal obligation, if void by the laws of the state in which it was executed and made payable, it ought likewise to be void in every other state where it is sought to be enforced. But it does not follow that because Mrs. Thomson is not bound by the note it is for that reason totally void. It still remains a valid obligation of her husband, which she can, in this state, secure by a mortgage of her separate statutory property. Dzialynski v. Bank of Jacksonville, 23 Fla. 346, 2 South. 696. We do not understand that any principle of interstate law requires us to test the validity or sufficiency of conveyances of or liens upon real estate in this state by the laws of other states or nations, even though such contracts may have been executed, or given to secure the performance of some act, within their jurisdiction. The reasons why we should not are obvious. The subject-matter, with reference to the title of which the conveyance or lien is executed, being at the time of such execution an immovable thing, not only located beyond the control of that sovereignty within whose jurisdiction the contract is executed, and forever so to remain, but then within the exclusive jurisdiction of another independent sovereignty, and forever so to remain, the parties to such conveyance are presumed to have contracted, at least so far as the immovable thing is concerned, with reference to the laws of that jurisdiction within whose borders the thing is situated. And no sovereign state, without express legislative sanction, is presumed to surrender to owners of immovable property within its limits the power to incumber or change the title thereto in any other manner than that pointed out by its laws. It is, therefore, almost universally held that, so far as real estate or immovable property is concerned, we must look to the laws of the state where it is situated for the rules which govern its descent, alienation, and transfer, and for the construction, validity, and effect of conveyances thereof (United States v. Crosby, 7 Cranch (U. S.) 115, 3 L. Ed. 287; McGoon v. Scales, 9 Wall. (U. S.) 23, 19 L. Ed. 545; Brine v. Hartford Fire Ins. Co., 96 U. S. 627, 24 L. Ed. 858; Gault v. Van Zile, 37 Mich. 22; Bissell v. Terry, 69 Ill. 184; West v. Fitz, 109 Ill. 425; Fessenden v. Taft, 65 N. H. 39, 17 Atl. 713; Curtis v. Hutton, 14 Ves. 537; Frierson v. Williams, 57 Miss. 451; Crolly v. Clark, 20 Fla. 849; Frazier v. Boggs, 37 Fla. 307, 20 South. 245); and it is to the same law that we must look for the rules governing the capacity of the parties to such contracts or conveyances,

and their rights under the same (Doyle v. McGuire, 38 Iowa, 410; Baum v. Birchall, 150 Pa. 164, 24 Atl. 620, 30 Am. St. Rep. 797; Chapman v. Robertson, 6 Paige (N. Y.) 627, 31 Am. Dec. 264; Succession of Larendon, 39 La. Ann. 952, 3 South. 219; Succession of Cassidy, 40 La. Ann. 827, 5 South. 292; 2 Pars. Cont. *572; Story. Confl. Laws, § 431; Ror. Interst. Law, p. 263). It would seem therefore, that upon principle the mortgage in this case should be subjected to the laws of this state, in order to ascertain its validity, construction, and the capacity of the parties to execute it, rather than to the laws of the state of Alabama, within whose borders the real estate is not situated, and as to which her laws can have no extraterritorial effect. While a contrary opinion was entertained in Ohio (Evans v. Beaver, 50 Ohio St. 190, 33 N. E. 643, 40 Am. St. Rep. 666), it has been held in several well-considered cases that, although by the laws of the state of a married woman's domicile she has no capacity to execute a mortgage upon her separate estate as security for the debt of her husband, yet if she, in that state, executes a mortgage of that character upon real estate situated in another state, whose laws permit a married woman to mortgage her property to secure such a debt, the mortgage will, in the latter state, be held valid, and enforceable in its courts by appropriate proceedings. Post v. First Nat. Bank, 38 Ill. App. 259, affirmed 138 Ill. 559, 28 N. E. 978; Cochran v. Benton, 126 Ind. 58, 25 N. E. 870; Johnston v. Gawtry, 11 Mo. App. 322. See, also, Frierson v. Williams, 57 Miss. 451; Goddard v. Sawyer, 9 Allen (Mass.) 78; Swank v. Hufnagle, 111 Ind. 453, 12 N. E. 303,—where the same principles were applied to a different state of facts. We hold that, notwithstanding Mrs. Thomson's incapacity by the laws of Alabama to execute the mortgage sought to be foreclosed here, she was capable, under our laws, of executing in Alabama a mortgage upon her separate statutory real property in this state to secure her husband's debt, and that her plea was properly overruled. This conclusion also disposes of those portions of the cross bill and answer of the defendant John M. Thomson which cover the same matters as this plea. * * *[6]

[6] The lex rei sitæ does not govern the capacity to transfer personal property. Huey's Appeal, 1 Grant's Cases (Pa.) 51 (1854); Kohne's Estate, 1 Pars. Eq. Cas. (Pa.) 399 (1850). It may be imposed, however, by statute. Loftus v. Farmers' & Mechanics' Nat. Bank, 133 Pa. 97, 19 Atl. 347, 7 L. R. A. 313 (1890).

CONTINENTAL LAW.—Capacity to act with respect to realty is governed by the national law of the parties. *Germany*, article 7, Law Intr. Civ. Code, subject, however, to renvoi (article 27, Law Intr.); *Italy*, article 6, Prel. Disp. Civ. Code; Cass. Rome, Jan. 5, 1906 (34 Clunet, 1205); Cass. Turin, May 10, 1867 (Giurispr. Tor. 1867, 1, 395). Contra: *France*, article 3, Civ. Code, providing for the application of the law of the situs; App. Paris, March 5, 1901 (28 Clunet, 775). See App. Paris, March 12, 1881 (8 Clunet, 355).

SECTION 2.—CORPORATIONS.

BANK OF AUGUSTA v. EARLE.

(Supreme Court of the United States, 1839. 13 Pet. 519, 10 L. Ed. 274.)

TANEY, C. J.[7] * * * The questions presented to the court arise upon a case stated in the Circuit Court in the following words:

"The defendant defends this action upon the following facts, that are admitted by the plaintiffs: that plaintiffs are a corporation, incorporated by an act of the Legislature of the state of Georgia, and have power usually conferred upon banking institutions, such as to purchase bills of exchange, etc. That the bill sued on was made and indorsed, for the purpose of being discounted by Thomas McGran, the agent of said bank, who had funds of the plaintiffs in his hands for the purpose of purchasing bills, which funds were derived from bills and notes discounted in Georgia by said plaintiffs, and payable in Mobile; and the said McGran, agent as aforesaid, did so discount and purchase the said bill sued on, in the city of Mobile, state aforesaid, for the benefit of said bank, and with their funds, and to remit said funds to the said plaintiffs.

"If the court shall say that the facts constitute a defence to this action, judgment will be given for the defendant, otherwise for plaintiffs, for the amount of the bill, damages, interest, and cost; either party to have the right of appeal or writ of error to the Supreme Court upon this statement of facts, and the judgment thereon."

Upon this statement of facts, the court gave judgment for the defendant; being of opinion that a bank incorporated by the laws of Georgia, with a power among other things to purchase bills of exchange, could not lawfully exercise that power in the state of Alabama, and that the contract for this bill was therefore void, and did not bind the parties to the payment of the money. * * *

The nature and character of a corporation created by a statute, and the extent of the powers which it may lawfully exercise, have upon several occasions been under consideration in this court.

In the case of Head v. Providence Ins. Co., 2 Cranch, 127, 2 L. Ed. 229, Chief Justice Marshall, in delivering the opinion of the court, said, "without ascribing to this body, which in its corporate capacity is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be precisely what the incorporating act has made it; to derive all its powers from that act, and to be

[7] The statement of facts, a part of the opinion, and the dissenting opinion of McKinley, J., have been omitted.

capable of exerting its faculties only in the manner which that act authorizes.

"To this source of its being, then, we must recur to ascertain its powers; and to determine whether it can complete a contract by such communications as are in this record."

In the case of Dartmouth College v. Woodward, 4 Wheat. 636, 4 L. Ed. 629, the same principle was again decided by the court. "A corporation," said the court, "is an artificial being, invisible, intangible, and existing only in contemplation of law. Being a mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence."

And in the case of the Bank of United States v. Dandridge, 12 Wheat. 64, 6 L. Ed. 552, where the questions in relation to the powers of corporations and their mode of action, were very carefully considered, the court said: "But whatever may be the implied powers of aggregate corporations by the common law, and the modes by which those powers are to be carried into operation; corporations created by statute must depend both for their powers and the mode of exercising them, upon the true construction of the statute itself."

It cannot be necessary to add to these authorities. And it may be safely assumed that a corporation can make no contracts, and do no acts either within or without the state which creates it, except such as are authorized by its charter; and those acts must also be done, by such officers or agents, and in such manner, as the charter authorizes. And if the law creating a corporation, does not, by the true construction of the words used in the charter, give it the right to exercise its powers beyond the limits of the state, all contracts made by it in other states would be void.

The charter of the Bank of Augusta authorizes it, in general terms, to deal in bills of exchange; and consequently, gives it the power to purchase foreign bills as well as inland; in other words, to purchase bills payable in another state. The power thus given, clothed the corporation with the right to make contracts out of the state, in so far as Georgia could confer it. For whenever it purchased a foreign bill, and forwarded it to an agent to present for acceptance, if it was honored by the drawee, the contract of acceptance was necessarily made in another state; and the general power to purchase bills without any restriction as to place, by its fair and natural import, authorized the bank to make such purchases, wherever it was found most convenient and profitable to the institution; and also to employ suitable agents for that purpose. The purchase of the bill in question was, therefore, the exercise of one of the powers which the bank possessed under its charter; and was sanctioned by the law of Georgia creating the corporation, so far as that state could authorize a corporation to exercise its powers beyond the limits of its own jurisdiction.

But it has been urged in the argument, that notwithstanding the

powers thus conferred by the terms of the charter, a corporation, from the very nature of its being, can have no authority to contract out of the limits of the state; that the laws of a state can have no extra-territorial operation; and that, as a corporation is the mere creature of a law of the state, it can have no existence beyond the limits in which that law operates; and that it must necessarily be incapable of making a contract in another place.

It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But although it must live and have its being in that state only, yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one state creates no insuperable objection to its power of contracting in another. It is indeed a mere artificial being, invisible and intangible; yet it is a person, for certain purposes in contemplation of law, and has been recognized as such by the decisions of this court. It was so held in the case of United States v. Amedy, 11 Wheat. 412, 6 L. Ed. 502, and in Beaston v. Farmers' Bank of Delaware, 12 Pet. 135, 9 L. Ed. 1017. Now natural persons, through the intervention of agents, are continually making contracts in countries in which they do not reside; and where they are not personally present when the contract is made; and nobody has ever doubted the validity of these agreements. And what greater objection can there be to the capacity of an artificial person, by its agents, to make a contract within the scope of its limited powers, in a sovereignty in which it does not reside; provided such contracts are permitted to be made by them by the laws of the place?

'The corporation must no doubt show that the law of its creation gave it authority to make such contracts, through such agents. Yet, as in the case of a natural person, it is not necessary that it should actually exist in the sovereignty in which the contract is made. It is sufficient that its existence as an artificial person, in the state of its creation, is acknowledged and recognized by the law of the nation where the dealing takes place; and that it is permitted by the laws of that place to exercise there the powers with which it is endowed.

Every power, however, of the description of which we are speaking, which a corporation exercises in another state, depends for its validity upon the laws of the sovereignty in which it is exercised; and a corporation can make no valid contract without their sanction, express or implied. And this brings us to the question which has been so elaborately discussed; whether, by the comity of nations and between these states, the corporations of one state are permitted to make contracts in another. It is needless to enumerate here the instances in which, by the general practice of civilized countries, the laws of the

one, will, by the comity of nations, be recognized and executed in another, where the right of individuals are concerned. The cases of contracts made in a foreign country are familiar examples; and courts of justice have always expounded and executed them, according to the laws of the place in which they were made; provided that law was not repugnant to the laws or policy of their own country. The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered; and is inadmissible when contrary to its policy, or prejudicial to its interests. But it contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong, that courts of justice have continually acted upon it, as a part of the voluntary law of nations. It is truly said, in Story's Conflict of Laws, 36, 37, that: "In the silence of any positive rule, affirming, or denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government; unless they are repugnant to its policy, or prejudicial to its interests. It is not the comity of the courts, but the comity of the nation which is administered, and ascertained in the same way, and guided by the same reasoning, by which all other principles of municipal law are ascertained and guided."

Adopting, as we do, the principle here stated, we proceed to inquire whether, by the comity of nations, foreign corporations are permitted to make contracts within their jurisdiction; and we can perceive no sufficient reason for excluding them, when they are not contrary to the known policy of the state, or injurious to its interests. It is nothing more than the admission of the existence of an artificial person created by the law of another state, and clothed with the power of making certain contracts. It is but the usual comity of recognizing the law of another state. In England, from which we have received our general principles of jurisprudence, no doubt appears to have been entertained of the right of a foreign corporation to sue in its courts; since, the case of Henriques v. Dutch West India Company (decided in 1729) 2 L. Raymond, 1532. And it is a matter of history, which this court are bound to notice, that corporations, created in this country, have been in the open practice for many years past, of making contracts in England of various kinds, and to very large amounts; and we have never seen a doubt suggested there of the validity of these contracts, by any court or any jurist. It is impossible to imagine that any court in the United States would refuse to execute a contract, by which an American corporation had borrowed money in England; yet if the contracts of corporations made out of the state by which they were created, are void, even contracts of that description could not be enforced.

It has, however, been supposed that the rules of comity between foreign nations do not apply to the states of this Union; that they extend to one another no other rights than those which are given by

the Constitution of the United States; and that the courts of the general government are not at liberty to presume, in the absence of all legislation on the subject, that a state has adopted the comity of nations towards the other states, as a part of its jurisprudence; or that it acknowledges any rights but those which are secured by the Constitution of the United States. The court think otherwise. The intimate union of these states, as members of the same great political family; the deep and vital interests which bind them so closely together should lead us, in the absence of proof to the contrary, to presume a greater degree of comity, and friendship, and kindness towards one another, than we should be authorized to presume between foreign nations. And when (as without doubt must occasionally happen) the interest or policy of any state requires it to restrict the rule, it has but to declare its will, and the legal presumption is at once at an end. But until this is done, upon what grounds could this court refuse to administer the law of international comity between these states? They are sovereign states; and the history of the past, and the events which are daily occurring, furnish the strongest evidence that they have adopted towards each other the laws of comity in their fullest extent. Money is frequently borrowed in one state, by a corporation created in another. The numerous banks established by different states, are in the constant habit of contracting and dealing with one another. Agencies for corporations engaged in the business of insurance and of banking have been established in other states, and suffered to make contracts without any objection on the part of the state authorities. These usages of commerce and trade have been so general and public, and have been practiced for so long a period of time, and so generally acquiesced in by the states, that the court cannot overlook them when a question like the one before us is under consideration. The silence of the state authorities, while these events are passing before them, show their assent to the ordinary laws of comity which permit a corporation to make contracts in another state. But we are not left to infer it merely from the general usages of trade, and the silent acquiescence of the states. It appears from the cases cited in the argument, which it is unnecessary to recapitulate in this opinion; that it has been decided in many of the state courts, we believe in all of them where the question has arisen, that a corporation of one state may sue in the courts of another. If it may sue, why may it not make a contract? The right to sue is one of the powers which it derives from its charter. If the courts of another country take notice of its existence as a corporation, so far as to allow it to maintain a suit, and permit it to exercise that power, why should not its existence be recognized for other purposes, and the corporation permitted to exercise another power which is given to it by the same law and the same sovereignty; where the last-mentioned power does not come in conflict with the interest or policy of the state? There is certainly nothing in the nature and character

of a corporation which could justly lead to such a distinction; and which should extend to it the comity of suit, and refuse to it the comity of contract. If it is allowed to sue, it would of course be permitted to compromise, if it thought proper, with its debtor; to give him time, to accept something else in satisfaction; to give him a release, and to employ an attorney for itself to conduct its suit. These are all matters of contract, and yet are so intimately connected with the right to sue, that the latter could not be effectually exercised if the former were denied. * * *

We think it is well settled, that by the law of comity among nations, a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its courts; and that the same law of comity prevails among the several sovereignties of this Union. The public and well known and long continued usage of trade; the general acquiescence of the states; the particular legislation of some of them, as well as the legislation of Congress; all concur in proving the truth of this proposition.

Rule & reasons.

But we have already said that this comity is presumed from the silent acquiescence of the state. Whenever a state sufficiently indicates that contracts which derive their validity from its comity are repugnant to its policy, or are considered as injurious to its interests; the presumption in favor of its adoption can no longer be made. And it remains to inquire, whether there is any thing in the Constitution or laws of Alabama, from which this court would be justified in concluding that the purchase of the bill in question was contrary to its policy. * * *

Exception

It is but justice to all the parties concerned to suppose that these contracts were made in good faith, and that no suspicion was entertained by either of them that these engagements could not be enforced. Money was paid on them by one party, and received by the other. And when we see men dealing with one another openly in this manner, and making contracts to a large amount, we can hardly doubt as to what was the generally received opinion in Alabama at that time in relation to the right of the plaintiffs to make such contracts. Everything now urged as proof of her policy, was equally public and well known when these bills were negotiated. And when a court is called on to declare contracts thus made to be void, upon the ground that they conflict with the policy of the state, the line of that policy should be very clear and distinct to justify the court in sustaining the defence. Nothing can be more vague and indefinite than that now insisted on as the policy of Alabama. It rests altogether on speculative reasoning as to her supposed interests, and is not supported by any positive legislation. There is no law of the state which attempts to define the rights of foreign corporations.

We, however, do not mean to say that there are not many subjects upon which the policy of the several states is abundantly evident, from

the nature of their institutions and the general scope of their legislation, and which do not need the aid of a positive and special law to guide the decisions of the courts. When the policy of a state is thus manifest, the courts of the United States would be bound to notice it as a part of its code of laws, and to declare all contracts in the state repugnant to it to be illegal and void. Nor do we mean to say whether there may not be some rights under the Constitution of the United States which a corporation might claim under peculiar circumstances, in a state other than that in which it was chartered. The reasoning, as well as the judgment of the court, is applied to the matter before us; and we think the contracts in question were valid, and that the defence relied on by the defendants cannot be sustained.

The judgment of the circuit court in these cases must therefore be reversed, with costs.

[8]As to doctrine of English courts, see E. Hilton Young, Status of Foreign Corporations and the Legislature, 23 Law Quar. Rev. 290–303.

The status of a corporation will in general be determined in accordance with the law of the state creating it. Mumma v. Potomac Co., 8 Pet. 281, 8 L. Ed. 945 (1834); Remington & Sons v. Samana Bay Co., 140 Mass. 494, 5 N. E. 292 (1886). See Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566, 19 L. Ed. 1029 (1870). This law will govern also the status of a stockholder. Nashua Sav. Bank v. Anglo-American Land Mortgage & Agency Co., 189 U. S. 221, 23 Sup. Ct. 517, 47 L. Ed. 782 (1903); McKim v. Glenn, 66 Md. 479, 8 Atl. 130 (1887); Electric Welding Co. v. Prince, 195 Mass. 242, 81 N. E. 306 (1907). And the powers of a corporation. Canada Southern R. Co. v. Gebhard, 109 U. S. 527, 3 Sup. Ct. 363, 27 L. Ed. 1020 (1883); Supreme Council of American Legion of Honor v. Green, 71 Md. 263, 17 Atl. 1048, 17 Am. St. Rep. 527 (1889). But the general laws of the state creating a corporation do not form a part of its charter, and hence have no extra-territorial effect. Mutual Life Ins. Co. v. Cohen, 179 U. S. 262, 21 Sup. Ct. 106, 45 L. Ed. 181 (1900); White v. Howard, 38 Conn. 342 (1871); Borton v. Brines-Chase Co., 175 Pa. 209, 34 Atl. 597 (1896). But see Starkweather v. American Bible Soc., 72 Ill. 50, 22 Am. Rep. 133 (1874).

The rights of a foreign corporation being dependent upon comity, it follows that it may be excluded by a state or admitted upon terms. Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357 (1868). As to the effect of noncompliance with the local statutes, see J. H. Beale, Jr., Foreign Corporations, §§ 212–214; 1 L. R. A. (N. S.) 1041–1042.

It also follows that no power granted by the charter can be exercised in the face of a prohibitive statute or a clearly defined local policy. White v. Howard, 46 N. Y. 144 (1871); Falls v. United States Sav. Loan & Building Co., 97 Ala. 417, 13 South. 25, 24 L. R. A. 174, 38 Am. St. Rep. 194 (1892); Lancaster v. Amsterdam Imp. Co., 140 N. Y. 576, 35 N. E. 964, 24 L. R. A. 322 (1894); Van Steuben v. Central R. Co. of New Jersey, 178 Pa. 367, 35 Atl. 992, 34 L. R. A. 577 (1896). And it is held that certain special privileges granted by the lex domicilii will not be recognized in another jurisdiction. People v. Coleman, 135 N. Y. 231, 31 N. E. 1022 (1892).

Nor will comity be carried so far as to recognize a foreign corporation not authorized to transact business in the chartering state. Land Grant Ry. & Trust Co. v. Board of Com'rs of Coffey County, 6 Kan. 245 (1870); Myatt v. Ponca City Land & Improvement Co., 14 Okl. 189, 78 Pac. 185, 68 L. R. A. 810 (1903). The mere fact, however, that a corporation is formed under the law of a state by citizens of another jurisdiction who intend to carry on the principal part of their business or all their business in their home state, will not deprive it of recognition by such state. Demarest v. Flack, 128 N. Y. 205, 28 N. E. 645, 13 L. R. A. 854 (1891); Lancaster v. Amsterdam Imp. Co., 140 N. Y. 576, 35 N. E. 964, 24 L. R. A. 322 (1894). But see Hill v.

Beach, 12 N. J. Eq. 31 (1858); Montgomery v. Forbes, 148 Mass. 249, 19 N. E. 342 (1889).

By transacting business in a foreign jurisdiction, a corporation becomes subject to its laws. Shannon v. Georgia State Building & Loan Ass'n, 78 Miss. 955, 30 South. 51, 57 L. R. A. 800, 84 Am. St. Rep. 657 (1901); Abraham v. Mutual Reserve Fund Life Ass'n, 183 Mass. 116, 66 N. E. 605 (1903). In many cases, however, the local law will be deemed to have no application to foreign corporations. Rumbough v. Southern Imp. Co., 106 N. C. 461, 11 S. E. 528 (1890); Vanderpoel v. Gorman, 140 N. Y. 563, 35 N. E. 932, 24 L. R. A. 548, 37 Am. St. Rep. 601 (1894).

CONTINENTAL LAW.—a. *In general.*—No jurisdiction will be taken for the purpose of dissolving a foreign corporation. Cass. Florence, June 25, 1896 (26 Clunet, 624). But when a corporation is formed in another country in order to evade the local law, it will be annulled by the courts of the state whose law has been evaded. Trib. Com. Seine, Aug. 26, 1902 (31 Clunet, 189). See, also, A. Lainé, Des personnes morales en droit international privé (20 Clunet, 273–309).

b. *Germany.*—Foreign corporations may sue and be sued. 22 R. O. H. G. 147 (April 28, 1877). Article 10, Law Intr. Civ. Code, is held inapplicable to foreign business corporations. O. L. G. Kiel, March 21, 1902 (12 Niemeyer, 469).

Their right to carry on business depends, however, upon the law of the particular states (see section 12, Industrial Law of Empire), which ordinarily presupposes governmental authorization. Their capacity to acquire realty may likewise be made dependent upon the law of the particular states. See article 88, Law Intr. Civ. Code.

See, also, E. Wolff, De la condition des sociétés étrangères en Allemagne, 13 Clunet, 134–145, 272–285, 641–656. Julius Plotke, Die Rechtsfähigkeit ausländischer juristischer Personen nach dem Bürgerlichen Gesetzbuch und einzelnen Ausführungsgesetzen zum B. G. B., 10 Niemeyer, 211–218, 269–277.

c. *France.*—Foreign corporations may be sued. Cass. May 19, 1863 (S. 1863, 1, 353); Cass. Aug. 10, 1875 (3 Clunet, 459).

Since the treaty of May 30, 1857, concluded between France and Belgium, foreign corporations, in the absence of treaty, are authorized to sue and to contract in France only if the conditions under which they are organized have been approved by a decree of the French government. Cass. Aug. 1, 1860 (S. 1860, 1, 866). See, also, Maurice Moutier, Du droit pour les sociétés commerciales étrangères d'ester en justice en France, 21 Clunet, 954–978.

d. *Italy.*—A foreign corporation may sue and be sued. Cass. Florence, June 21, 1894 (Giurispr. Ital. 1894, 1, 839); App. Venice, July 11, 1893 (Giurispr. Ital. 1893, 2, 540); App. Catania, Mch. 6, 1899 (Giurispr. Ital. 1899, 2, 406).

Foreign corporations intending to establish an agency or branch in Italy must comply with articles 230–232, Com. Code. If their principal place of business is in Italy, Italian law will govern, even as to the validity of their creation. Article 230, Com. Code. See Cass. Turin, March 15, 1906 (35 Clunet, 909). See, also, G. Danieli, De la condition des sociétés étrangères en Italie, 15 Clunet, 17–32, 330–343; Charles Lefèvre, De la condition des sociétés étrangères en Italie, 11 Clunet, 234–246.

CHAPTER VII.

FORM.

LEROUX v. BROWN.

(Court of Common Pleas, 1852. 74 Eng. Com. Law, 801.)

An oral agreement was entered into at Calais, France, between the plaintiff and the defendant, under which the latter, who resided in England, contracted to employ the former, who was a British subject residing at Calais, at a salary of £100. per annum, to collect poultry and eggs in that neighborhood for transmission to the defendant in England, the employment to commence at a future day and to continue for a year certain.

Evidence was given on the part of the plaintiff to show that by the law of France such an agreement is capable of being enforced, although not in writing. The defendant insisted that the contract, being a contract not to be performed within a year, was unenforceable in England.

The court directed a verdict for plaintiff; leave being reserved to the defendant to move to enter a nonsuit or a verdict for him, if the court should be of opinion that the contract could not be enforced in England.

A rule nisi was obtained accordingly.[1]

JERVIS, C. J.[2] I am of opinion that the rule to enter a nonsuit must be made absolute. There is no dispute as to the principles which ought to govern our decision. My Brother Allen admits, that, if the fourth section of the statute of frauds applies, not to the validity of the contract, but only to the procedure, the plaintiff cannot maintain this action, because there is no agreement, nor any memorandum or note thereof, in writing. On the other hand, it is not denied by Mr. Honyman, who has argued this case in a manner for which the court is much indebted to him, that, if the fourth section applies to the contract itself, or, as Boullenois expresses it, to the solemnities of the contract, inasmuch as our law cannot regulate foreign contracts, a contract like this may be enforced here. I am of opinion that the fourth section applies not to the solemnities of the contract, but to the procedure; and therefore that the contract in question cannot be sued upon here. The contract may be capable of being enforced in the country where it was made: but not in England. Looking at

[1] This statement of facts has been substituted for that of the original report.

[2] The concurring opinions of Maule and Talfourd, JJ., have been omitted.

the words of the fourth section of the statute of frauds, and contrasting them with those of the first, third, and seventeenth sections, this conclusion seems to me to be inevitable. The words of section 4 are, "No action shall be brought upon any agreement which is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereto by him lawfully authorized." The statute, in this part of it, does not say, that, unless those requisites are complied with, the contract shall be void, but merely that no action shall be brought upon it; and, as was put with great force by Mr. Honyman, the alternative, "unless the agreement, or some memorandum or note thereof, shall be in writing," words which are satisfied if there be any written evidence of a previous agreement, shows that the statute contemplated that the agreement may be good, though not capable of being enforced if not evidenced by writing. This therefore may be a very good agreement, though, for want of a compliance with the requisites of the statute, not enforceable in an English court of justice. This view seems to be supported by the authorities; because, unless we are to infer that the courts thought the agreement itself good, though not made in strict compliance with the statute, they could not consistently have held, as was held in the cases referred to by Sir Edward Sugden, that a writing subsequent to the contract, and addressed to a third person, was sufficient evidence of an agreement, within the statute. It seems, therefore, that both authority and practice are consistent with the words of the 4th section. The cases of Carrington v. Roots and Reade v. Lamb, however, have been pressed upon us as being inconsistent with this view. It is sufficient to say that the attention of the learned judges by whom those cases were decided, was not invited to the particular point now in question. What they were considering was, whether, for the purposes of those actions, there was any substantial difference between the 4th and 17th sections. It must be borne in mind that the meaning of those sections has been the subject of discussion on other occasions. In Crosby v. Wadsworth, 6 East, 602, Lord Ellenborough, speaking of the fourth section, says: "The statute does not expressly and immediately vacate such contracts, if made by parol. It only precludes the bringing of actions to enforce them." Again, in Laythoarp v. Bryant, 2 N. C. 735, 3 Scott, 238, Tindal, C. J., and Bosanquet, J., say distinctly that the contract is good, and that the statute merely takes away the remedy, where there is no memorandum or note in writing. I therefore think we are correct in holding that the contract in this case is incapable of being enforced by an action in this country, because the fourth section of St. 29 Car. II, c. 3, relates only to the procedure, and not to the right and validity of the contract itself. As to what is said by Boullenois in the passage last cited by Brother Allen, it is to be ob-

served that the learned author is there speaking of what pertains ad vinculum obligationis et solemnitatem, and not with reference to the mode of procedure. Upon these grounds, I am of opinion that this action cannot be maintained, and that the rule to enter a nonsuit must be made absolute.[3]

HOUGHTALING v. BALL.

(Supreme Court of Missouri, 1855. 20 Mo. 563.)

This was an action brought to recover the price of wheat alleged in the petition to have been sold and delivered at Chicago, Ill., to be paid for on its arrival in St. Louis.

SCOTT, J.[4] This case is here a second time, and on the same question that was determined when it was here before. 19 Mo. 84, 59 Am. Dec. 331. The real question is one of fact, and the aim of the plaintiff is, to have that fact tried by a jury, viz. whether the contract set out in the petition was not so completed in the state of Illinois by a delivery of the wheat, as to avoid the objection to it arising from the statute of frauds, as it does not appear from the record that there is any statute in that state which affects the contract stated in the plaintiff's petition. * * *

Without determining whether the case of Leroux v. Brown, 74 Eng. C. L. 801, would be recognized as law here, it is sufficient to say in relation to it, that it is founded on the fourth section of the English statute of frauds (St. 29 Car. II, c. 3), which enacts, "that no action shall be brought," etc. These words are made to control the judgment rendered in that suit. But the contract sued on here is not under the fourth section of the English statute, nor under the fifth section of our law (Rev. St. 1845, c. 68) which corresponds with the fourth section of the English statute. But the action is un-

[3] The distinction between the fourth and seventeenth sections of the statute of frauds was approved in Third Nat. Bank v. Steel, 129 Mich. 434, 88 N. W. 1050, 64 L. R. A. 119 (1902). Only the fourth section, however, was in question. It was rejected expressly in Heaton v. Eldridge, 56 Ohio St. 87, 46 N. E. 638, 36 L. R. A. 817, 60 Am. St. Rep. 737 (1897), and by Townsend v. Hargraves, 118 Mass. 325 (1875), which hold that despite a difference of phraseology, both sections relate to the remedy. In the former case, however, only the fourth section was involved. The latter turned upon the seventeenth section, but involved no conflict.

The seventeenth section has been superseded in England by section 4 of the Sales of Goods Act of 1893, in which the expression "shall not be enforced by action" has been substituted.

A similar distinction has been made with reference to the stamp laws of a country. If under the local law the want of a stamp relates merely to evidence, the contract itself being valid, the lex fori will govern; but, if the contract under the law of the place where it is made is void for want of a stamp, no action will lie in any jurisdiction. Alves v. Hodgson, 1797, 7 T. R. 241; Bristow v. Sequeville, 1850, 5 Exch. 275; Ludlow v. Van Rensselaer, 1 Johns. (N. Y.) 94 (1806); Fant v. Miller, 17 Grat. (Va.) 47 (1866).

[4] A part of the opinion only is given.

der the sixth section of our statute, which corresponds with the seventeenth section of the English statute. The words of these corresponding sections are different from those of the fourth in the English, and the fifth section in the Missouri, statute. They are, "that no contract shall be good," etc. So they leave application for the rule of law that a contract, valid at the place where made, shall be valid everywhere, except when it contravenes the policy, or is in derogation of the rights of the country where it is sought to be enforced. * * *[5]

COCHRAN v. WARD.

(Appellate Court of Indiana, 1892. 5 Ind. App. 89, 29 N. E. 795, 51 Am. St. Rep. 229.)[6]

CRUMPACKER, J. This action was commenced by Cochran against Ward to recover damages for the breach of a parol lease for lands in the state of Illinois. The complaint alleges, in substance, that the defendant was the owner and in possession of a tract of 400 acres of farm land, situated in Lawrence county, in the state of Illinois, and on the 20th day of April, 1888, said defendant rented said land to the plaintiff for the term of one year, beginning on the 1st day of July, 1888, and agreed to surrender the possession thereof to the plaintiff on that day; that plaintiff was to yield and pay a specified share of the crop as rental; that plaintiff relied upon said agreement. and failed to procure other land to cultivate until it was too late in the season to obtain any, and stood ready and willing to perform said lease, but the defendant wrongfully refused to surrender the possession of said premises, as he had agreed, and refused to permit plaintiff to cultivate said land, but rented a great portion of it to another, whereby plaintiff was thrown out of employment, and lost the benefit of said lease, to his damage, etc. An answer of five paragraphs was filed to the complaint, the first of which was the general denial. The fifth alleged that the agreement sued upon was in parol, and that it was made in the state of Illinois, where the defendant lived, and the real estate was situate, and that under the Illinois statute of frauds the agreement was not enforceable. A copy of section 1 and 2 of the statute was pleaded with this paragraph. They are as follows: "Section 1. Be it enacted by the people of the state of Illinois, represented in the general assembly, that no action shall be brought whereby to charge any executor or administrator upon any special promise to answer any debt or damages out

[5]Accord: Allen v. Schuchardt, Fed. Cas. No. 236 (1861); F. W. Brockman Commission Co. v. Kilbourne, 111 Mo. App. 542, 86 S. W. 275 (1905).

The law of the place of performance seems to be immaterial. Perry v. Mt. Hope Iron Co., 15 R. I. 380, 5 Atl. 632, 2 Am. St. Rep. 902 (1886).

[6]Affirmed on petition for rehearing, 5 Ind. App. 97, 31 N. E. 581, 51 Am. St. Rep. 229.

of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon an agreement that it is not to be performed within the space of one year from the making thereof, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. Sec. 2. No action shall be brought to charge any person upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them for a longer term than one year, unless such contract, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized in writing, signed by such party. This section shall not apply to sales upon executions, or by any officer or person pursuant to a decree or order of any court of record in this state." The issues were closed by reply, and the cause tried by a jury, and resulted in a verdict for the plaintiff. At the request of the defendant the court submitted interrogatories to the jury, which they answered, and the court gave judgment in favor of the defendant upon the interrogatories, notwithstanding the general verdict.

A number of questions relative to the rulings of the court in making the issues were reserved by counsel for appellant, but the issues of fact out of which such questions arose, having been all decided in appellant's favor by the jury, we cannot regard such questions as material under section 658, Rev. St. 1881. The controlling question in the case relates to the action of the court in awarding appellee judgment upon the special findings. The jury found in answer to the interrogatories that the agreement was by parol, and was completed in the state of Illinois on the 20th day of April, 1888, and purported to lease the real estate described in the complaint for one year from the 1st day of July, 1888; that said real estate was in the state of Illinois, and the agreement was to have been performed in that state. They also found the first section of the Illinois statute, as set out with the answer, to have been in force at the time the agreement was made. It is admitted by both parties in the argument that under the law in Illinois a parol agreement to lease real estate for the term of a year, to begin at some definite time in the future, comes within the provisions of section 1 of the Illinois statute, and consequently is not enforceable. So tested by the Illinois law, the agreement in suit in the case before us is voidable, and damages could not be recovered for its breach. Wheeler v. Frankenthal, 78 Ill. 124; Comstock v. Ward, 22 Ill. 248; Olt v. Lohnas, 19 Ill. 576. The fifth clause of section 1 of our statute of "frauds and perjuries" (section 4904, Rev. St. 1881) provides that no action shall be brought "upon any agreement that is not to be performed within one year from the making thereof," unless

in writing, etc. This is substantially the same as the Illinois provision, and is taken from the English statute of 29 Car. II. c. 3. But our statute permits parol leases for a term not exceeding three years, and it is the settled law of this state that the clause above quoted has no reference to contracts relating to real estate. Railsback v. Walke, 81 Ind. 409; Baynes v. Chastain, 68 Ind. 376; Fall v. Hazelrigg, 45 Ind. 576, 15 Am. Rep. 278. So it is seen that the agreement in controversy is not repugnant to any provision of the statute of this state, and must be held good if the laws of this state are applicable. With considerable force and ingenuity counsel for appellant contend that the statute of frauds relates entirely to the remedy and procedure, and that the rule is universal that the lex fori always controls in such matters. This doctrine was announced by the courts as applicable to personal contracts in Leroux v. Brown, 12 C. B. 801, and Downer v. Chesebrough, 36 Conn. 39, 4 Am. Rep. 29. It seems to be generally admitted that the statute of frauds does not render an agreement absolutely void, but simply witholds the power of enforcement and prevents the collection of damages for non-performance. The rule in Indiana and Illinois is the same in this respect. Lowman v. Sheets, 124 Ind. 416, 24 N. E. 351, 7 L. R. A. 784; Schierman v. Beckett, 88 Ind. 52; Wills v. Ross, 77 Ind. 1, 40 Am. Rep. 279; Morris v. Goodwin, 1 Ind. App. 481, 27 N. E. 985; Wheeler v. Frankenthal, supra; Collins v. Thayer, 74 Ill. 138; Chicago Attachment Co. v. Davis Sewing Mach. Co. (Ill.) 25 N. E. 669. A contract made in another state, and which is void under the laws of that state, will not be enforced in this state, even though it would have been good if made here. Keiwert v. Meyer, 62 Ind. 587, 30 Am. Rep. 206. But it is claimed that the rule applied to contracts relating to real estate is different from that applied to personal contracts, and that the former are governed by the lex loci rei sitæ. There can be no doubt of the correctness of this rule in so far as it relates to questions of construction, title, covenants real, mode and formality of execution, and all things else which the laws of the situs impress upon the nature of the property, and the character of the tenure and mode of transmission. But where a conveyance is executed in this state, between citizens of this state, for lands in another state, in so far as it treats of covenants which never attach to the soil, but are essentially personal, the laws of this state control. Jackson v. Green, 112 Ind. 341, 14 N. E. 89; Bethell v. Bethell, 92 Ind. 318; Fisher v. Parry, 68 Ind. 465; Craig v. Donovan, 63 Ind. 513.

But it is insisted that as to mere matters of procedure every forum must apply its own laws and rules, regardless of the character of the action, and to a certain extent we think this must be true. In the case before us, however, under the findings of the jury, the place of the contract and the situs are the same, and the judgment of the trial court must be upheld, unless we regard the statute of frauds as relating merely to the procedure, and not as affecting the obligatory character of the agreement. It is impossible to consider a contract separate-

ly from the remedy given by the law for its enforcement, because it is this that supplies it with legal vitality. The law is an essential factor in every contract, and is presumed to be considered by the parties in their deliberations. If the law of the place stamps upon an agreement the quality that it shall be voidable, and that its performance shall be a pure matter of conscience or grace with the parties, that quality becomes a part of the substance of the agreement, and characterizes it wherever it may be. A right without a remedy for its enforcement is a mere fiction. Thus it was said by Swayne, J., for the court, in Edwards v. Kearzey, 96 U. S. 595, 24 L. Ed. 793: "It is also the settled doctrine of this court that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge, and enforcement." At another place in the opinion the learned judge said: "The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than its means of enforcement. This is the breath of its vital existence. Without it the contract, as such, in the view of the law, ceases to be, and falls into the class of those 'imperfect obligations,' as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable. 'Want of right and want of remedy are the same thing.'" There can be no doubt, we think, that to the extent that the remedy affects the validity and obligation of a contract it is imported into and becomes an essential part of it, and characterizes it wherever it is the subject-matter of litigation. The Illinois statute of frauds became part of the agreement in suit, and the provision that no action should be maintained for damages for the breach of the agreement became as much a part of its character and substance as if specifically incorporated therein. The right to defend against a contract growing out of any of its inherent qualities becomes vested, and a right of property, as much as the right to enforce any other beneficial provision. Pritchard v. Norton, 106 U. S. 124, 1 Sup. Ct. 102, 27 L. Ed. 104; Cooley, Const. Lim. 362–369. This doctrine does not conflict with the general rule that in matters of procedure the lex fori controls. "Procedure," in this connection, applies to the nature of the action; as, whether it shall be covenant, assumpsit, debt, etc., to the rules of pleading and evidence, the order and manner of trial, and the nature and effect of process, and perhaps to all other matters of remedy only, which are not incorporated into the contract as affecting its nature and obligatory character. The case of Leroux v. Brown, supra, holding a different doctrine, was questioned in a later English case, and is criticised by a recent English writer. Gibson v. Holland, L. R. 1 C. P. 1; Maxw. Int. St. (2d Ed.) p. 180. The case of Downer v. Chesebrough, supra, decides only that the lex fori should supply the rules of evidence. In the case of Low v. Andrews, 1 Story (U. S.) 38, Fed.

Cas. No. 8,559, it was held that a contract for the sale of goods in France, if valid there, would be enforced in this country, though within the statute of frauds here. In Scudder v. Union Nat. Bank, 91 U. S. 406, 23 L. Ed. 245, it was held that in an action upon the parol acceptance of a bill of exchange to be performed in Missouri, the statute of frauds of the place of the contract should control, as it affected the formality necessary to create a legal obligation. The case of Kling v. Fries, 33 Mich. 276, was an action in Michigan upon a contract for the sale of goods in Ohio. It was held that the Ohio statute of frauds applied. The case of Houghtaling v. Ball, 19 Mo. 84, 59 Am. Dec. 331, was an action in Missouri upon a contract for the sale of wheat to be delivered in the state of Illinois. It was decided that the Illinois statute of frauds obtained. The case of Anderson v. May, 10 Heisk. (Tenn.) 84, was an action in Tennessee upon a lease for lands in Arkansas. The court decided that the statute of frauds of the latter state should be allowed to control the contract. Denny v. Williams, 5 Allen (Mass.) 1, was an action in Massachusetts, upon a contract for the sale of wool in New York, and the defendant set up the New York statute of frauds. The court held the answer good, saying: "As the contract was made in the city of New York, and was to be performed there, the laws of the state of New York must govern us in respect to its construction and performance." The Supreme Court of Louisiana, in Vidal v. Thompson, 11 Mart. (La.) 23, said: "An instrument, as to its form and the formalities attending its execution, must be tested by the laws of the place where it was made." In the case of Pickering v. Fisk, 6 Vt. 102, the court used this language: "As to the requisites of a valid contract, the mode of authentication, the forms and ceremonies required, and, in general, as to everything which is necessary to perfect or consummate the contract, the lex loci contractus governs, though with respect to conveyances or other contracts relating to real estate the statutory regulations of the place where such estate is situated must be observed." The same principle was applied in the following cases: Hallgarten v. Oldham, 135 Mass. 1, 46 Am. Rep. 433; Dacosta v. Davis, 24 N. J. Law, 319; Gross v. Jordan, 83 Me. 380, 22 Atl. 250; Butters v. Glass, 31 U. C. Q. B. 379; Van Reimsdyk v. Kane, 1 Gall. 630, Fed. Cas. No. 16,872; R. Co. v. Glenn, 28 Md. 287, 92 Am. Dec. 688; Fox v. Matthews, 33 Miss. 433; Young v. Pearson, 1 Cal. 448; Wilcox Silver Plate Co. v. Green, 72 N. Y. 17. There is no analogy between cases like the one before us and cases in which the bar of prescription has become complete against a demand. In the latter it is a question of presumptive payment or extinguishment, and such presumption, while evidential, is made conclusive as a measure of public policy, while in the former it is a question whether there ever was a legal liability. It should be kept in mind in this case that the controversy is between the lex fori upon the one hand and the lex loci contractus and the lex rei sitæ upon the other; consequently we have maintained no distinction between the latter,

nor between actions real and personal. There was no error in awarding appellee judgment upon the special findings. Nor was there any error in permitting the law to be read from the statute book purporting to have been printed by authority. This is authorized by section 457, Rev. St. 1881.

The judgment is affirmed.[7]

SCUDDER v. UNION NAT. BANK OF CHICAGO.

(Supreme Court of the United States, 1875. 91 U. S. 406, 23 L. Ed. 245.)

Error to the Circuit Court of the United States for the Northern District of Illinois.

HUNT, J.[8] * * * Upon the merits, the case is this: The plaintiff below sought to recover from the firm of Henry Ames & Co., of St. Louis, Mo., the amount of a bill of exchange, of which the following is a copy, viz.:

"$8,125.00. Chicago, July 7, 1871.

"Pay to the order of Union National Bank eight thousand one hundred and twenty-five dollars, value received, and charge to account of Leland & Harbach. "To Messrs. Henry Ames & Co., St. Louis, Mo."

By the direction of Ames & Co., Leland & Harbach had bought for them, and on the 7th day of July, 1871, shipped to them at St. Louis, 500 barrels of pork, and gave their check on the Union Bank to Hancock, the seller of the same, for $8,000.

Leland & Harbach then drew the bill in question, and sent the same by their clerk to the Union Bank (the plaintiff below) to be placed to their credit. The bank declined to receive the bill, unless accompanied by the bill of lading or other security. The clerk returned, and reported accordingly to Leland & Harbach. One of the firm then directed the clerk to return to the bank, and say that Mr. Scudder, one of the firm of Ames & Co. (the drawees), was then in Chicago, and had authorized the drawing of the draft; that it was drawn

[7] Accord: Miller v. Wilson, 146 Ill. 523, 34 N. E. 1111, 37 Am. St. Rep. 186 (1893).

Where the lex rei sitæ and the lex loci contractus do not coincide, the former has been held to apply. Meylink v. Rhea, 123 Iowa, 310, 98 N. W. 779 (1904). The lex loci contractus et fori, however, has been held to exclude the lex rei sitæ et solutionis with regard to personal property. Dacosta v. Davis, 24 N. J. Law, 319 (1854).

The statute of frauds of the forum may establish a policy which a foreign contract will not be permitted to override. Emery v. Burbank, 163 Mass. 326, 39 N. E. 1026, 28 L. R. A. 57, 47 Am. St. Rep. 456 (1895).

As to the statute of frauds in general, see 19 L. R. A. 792–794; 64 L. R. A. 119–124.

[8] The statement of facts and a part of opinion have been omitted.

against 500 barrels of pork that day bought by Leland & Harbach for them, and duly shipped to them. The clerk returned to the bank, and made this statement to its vice president; who thereupon, on the faith of the statement that the bill was authorized by the defendants, discounted the same, and the proceeds were placed to the credit of Leland & Harbach. Out of the proceeds the check given to Hancock for the pork was paid by the bank.

The direction to inform the bank that Mr. Scudder was in Chicago and had authorized the drawing of the draft was made in the presence and in the hearing of Scudder, and without objection by him.

The point was raised in various forms upon the admission of evidence, and by the charge of the judge, whether, upon this state of facts, the firm of Ames & Co., the defendants, were liable to the bank for the amount of the bill. The jury, under the charge of the judge, held them to be liable; and it is from the judgment entered upon that verdict that the present writ of error is brought.

The question is discussed in the appellant's brief, and properly, as if the direction to the clerk had been given by Scudder in person. The jury were authorized to consider the direction in his name, in his presence and hearing, without objection by him, as made by himself.

The objection relied on is, that the transaction amounted at most to a parol promise to accept a bill of exchange then in existence. It is insisted that such a promise does not bind the defendants.

The suit to recover upon the alleged acceptance, or upon the refusal to accept, being in the state of Illinois, and the contract having been made in that state, the judgment is to be given according to the law of that state. The law of the expected place of performance, should there be a difference, yields to the lex fori and the lex loci contractus.

In Wheaton on Conflict of Laws, § 401p, the rule is thus laid down: "Obligations, in respect to the mode of their solemnization, are subject to the rule locus regit actum; in respect to their interpretation, to the lex loci contractus; in respect to the mode of their performance, to the law of the place of their performance. But the lex fori determines when and how such laws, when foreign, are to be adopted, and, in all cases not specified above, supplies the applicatory law." Miller v. Tiffany, 1 Wall. 310, 17 L. Ed. 540; Chapman v. Robertson, 6 Paige (N. Y.) 634, 31 Am. Dec. 264; Andrews v. Pond, 13 Pet. 78, 10 L. Ed. 61; Lanusse v. Barker, 3 Wheat. 147, 4 L. Ed. 343; Adams v. Robertson, 37 Ill. 59; Ferguson v. Fuffe, 8 C. & F. 121; Bain v. Whitehaven & Furness Junction Ry. Co., 3 H. L. Cas. 1; Scott v. Pilkington, 15 Abb. Prac. (N. Y.) 280; Story, Confl. Laws, 203; De Wolf v. Johnson, 10 Wheat. 383, 6 L. Ed. 343.

The rule is often laid down, that the law of the place of performance governs the contract.

Mr. Parsons, in his treatise on Notes and Bills, uses this language: "If a note or bill be made payable in a particular place, it is to be

treated as if made there, without reference to the place at which it is written or signed or dated." Page 324.

For the purposes of payment, and the incidents of payment, this is a sound proposition. Thus the bill in question is directed to parties residing in St. Louis, Mo., and contains no statement whether it is payable on time or at sight. It is, in law, a sight draft. Whether a sight draft is payable immediately upon presentation, or whether days of grace are allowed, and to what extent, is differently held in different states. The law of Missouri, where this draft is payable, determines that question in the present instance.

The time, manner, and circumstances of presentation for acceptance or protest, the rate of interest when this is not specified in the bill (Young v. Harris, 14 B. Mon. [Ky.] 556, 61 Am. Dec. 170; Pomeroy v. Ainsworth, 22 Barb. [N. Y.] 118), are points connected with the payment of the bill, and are also instances to illustrate the meaning of the rule, that the place of performance governs the bill.

The same author, however, lays down the rule, that the place of making the contract governs as to the formalities necessary to the validity of the contract. Page 317. Thus, whether a contract shall be in writing, or may be made by parol, is a formality to be determined by the law of the place where it is made. If valid there, the contract is binding, although the law of the place of performance may require the contract to be in writing. Dacosta v. Davis, 24 N. J. Law, 319.

So when a note was indorsed in New York, although drawn and made payable in France, the indorsee may recover against the payee and indorser upon a failure to accept, although by the laws of France such suit cannot be maintained until after default in payment. Aymar v. Sheldon, 12 Wend. (N. Y.) 439, 27 Am. Dec. 137.

So if a note, payable in New York, be given in the state of Illinois for money there lent, reserving ten per cent. interest, which is legal in that state, the note is valid, although but seven per cent. interest is allowed by the laws of the former state. Miller v. Tiffany, 1 Wall. 310, 17 L. Ed. 540; Depeau v. Humphreys, 8 Mart. (N. S.) 1; Chapman v. Robertson, 6 Paige (N. Y.) 634, 31 Am. Dec. 264; Andrews v. Pond, 13 Pet. 65, 10 L. Ed. 61.

Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought.

A careful examination of the well-considered decisions of this country and of England will sustain these positions.

There is no statute of the state of Illinois that requires an acceptance of a bill of exchange to be in writing, or that prohibits a parol promise to accept a bill of exchange: on the contrary, a parol acceptance

and a parol promise to accept are valid in that state, and the decisions of its highest court hold that a parol promise to accept a bill is an acceptance thereof. If this be so, no question of jurisdiction or of conflict of laws arises. The contract to accept was not only made in Illinois, but the bill was then and there actually accepted in Illinois, as perfectly as if Mr. Scudder had written an acceptance across its face, and signed thereto the name of his firm. The contract to accept the bill was not to be performed in Missouri. It had already, by the promise, been performed in Illinois. The contract to pay was, indeed, to be performed in Missouri; but that was a different contract from that of acceptance. Nelson v. First Nat. Bank, 48 Ill. 39, 95 Am. Dec. 510; Mason v. Dousay, 35 Ill. 424, 85 Am. Dec. 368; Jones v. Council Bluffs Branch of State Bank, 34 Ill. 319, 85 Am. Dec. 306.

Unless forbidden by statute, it is the rule of law generally, that a promise to accept an existing bill is an acceptance thereof, whether the promise be in writing or by parol. Wynne v. Raikes, 5 East, 514; Bank of Ireland v. Archer, 11 M. & W. 383; Hough v. Loring, 24 Pick. (Mass.) 254; Ward v. Allen, 2 Metc. (Mass.) 53, 35 Am. Dec. 387; Bank of Rutland v. Woodruff, 34 Vt. 92; Spaulding v. Andrews, 48 Pa. 411; Williams v. Winans, 14 N. J. Law, 339; Storer v. Logan, 9 Mass. 56; Byles on Bills, § 149; Barney v. Worthington, 37 N. Y. 112. See the Illinois cases cited, supra. * * *

These principles settle the present case against the appellants.

It certainly does not aid their case, that after assuring the bank, through the message of Leland & Harbach, that the draft was drawn against produce that day shipped to the drawees, and that it was drawn by the authority of the firm (while, in fact, the produce was shipped to and received and sold by them), and that the bank in reliance upon this assurance discounted the bill, Mr. Scudder should at once have telegraphed his firm in St. Louis to delay payment of the draft, and, by a subsequent telegram, should have directed them not to pay it.

The judgment must be affirmed.

Hall bot; Cordell drawee; Hall refused to accept, which he had promised to do.

HALL v. CORDELL.

(Supreme Court of the United States, 1891. 142 U. S. 116, 12 Sup. Ct. 154, 35 L. Ed. 956.)

The case was stated by the court as follows:

This was an action of assumpsit. It was based upon an alleged verbal agreement made on or about April 1, 1886, at Marshall, Mo., between the defendants in error, plaintiffs below, doing business at that place as bankers, under the name of Cordell & Dunnica, and the plaintiffs in error, doing business at the Union Stockyards, Chicago, Ill., under the name of Hall Bros. & Co. There was a verdict and judgment in favor of the plaintiffs for $5,785.79.

Acceptance in Ill. payment in Mo. ∴ contr. made under law of Ill. in both cases

But place of payment Mo.

Pltff: Cordell, contract made in Mo.; bot Bk in Ill.; but in Hall case, contract made, & Bk in Mo.

The alleged agreement was, in substance, that Hall Bros. & Co. would accept and pay, or pay on presentation, all drafts made upon them by one George Farlow, in favor of Cordell & Dunnica, for the cost of any live stock bought by Farlow and shipped by him from Missouri to Hall Bros. & Co. at the Union Stockyards at Chicago.

There was proof before the jury tending to show that, on or about July 13, 1886, Farlow shipped from Missouri 9 car loads of cattle and 1 car load of hogs, consigned to Hall Bros. & Co. at the Union Stockyards, Chicago; that such cattle and hogs were received by the consignees, and by them were sold for account of Farlow; that, out of the proceeds, they retained the amount of the freight on the shipment, the expenses of feeding the stock on the way and at the stockyards, the charges at the yards and of the persons who came to Chicago with the stock, the commissions of the consignees on the sale, the amount Farlow owed them for moneys paid on other drafts over and above the net proceeds of live stock received and sold for him on the market, and $2,000 due from Farlow to Hall Bros. & Co. on certain past-due promissory notes given for money loaned to him; that, at the time of the above shipment, Farlow, at Marshall, Mo., the place of agreement, made his draft, of date July 13, 1886, upon Hall Bros. & Co., at the Union Stockyards, Chicago, in favor of Cordell & Dunnica, for $11,274, the draft stating that it was for the 9 car loads of cattle and 1 car load of hogs; that this draft was discounted by Cordell & Dunnica, and the proceeds placed to Farlow's credit on their books; that the proceeds were paid out by the plaintiffs on his checks in favor of the parties from whom he purchased the stock mentioned in the draft, and for the expenses incurred in the shipment; that the draft covered only the cost of the stock to Farlow; that, upon its presentation to Hall Bros. & Co., they refused to pay it, and the same was protested for nonpayment; and that subsequently Cordell & Dunnica received from Hall Bros. & Co. only the sum of $5,936.55, the balance of the proceeds of the sale of the above cattle and hogs, consigned to them as stated, after deducting the amounts retained by the consignees out of such proceeds on the several accounts above mentioned.

The contract sued upon having been made in Missouri, the defendant contended that it was invalid under the statutes of that state which are cited in the opinion of the court, infra, and could not be made the basis for a recovery in Illinois. This contention being overruled, the defendant excepted, and, judgment having been given for the plaintiff, sued out this writ of error.

HARLAN, J. There was evidence on behalf of the defendants tending to show that no such agreement was made as that alleged. But the issues of fact were fairly submitted to the jury, and we must assume, on this writ of error, that the jury found from the evidence that the alleged agreement was made between the parties.

Our examination must be restricted to the questions of law involved in the rulings of the court below. And the only one which, in our

judgment, it is necessary to notice, is that arising upon the instructions asked by the defendant, and which the court refused to give, to the effect that the agreement in question, having been made in Missouri, and not having been reduced to writing, was invalid under the statutes of that state, and could not be recognized in Illinois as the basis of an action there against the defendants.

The statute of Missouri referred to is as follows: "Sec. 533. No person within this state shall be charged as an acceptor of a bill of exchange, unless his acceptance shall be in writing, signed by himself or his lawful agent. Sec. 534. If such acceptance be written on a paper other than the bill, it shall not bind the acceptor, except in favor of a person to whom such acceptance shall have been shown, and who, upon the faith thereof, shall have received the bill for a valuable consideration. Sec. 535. An unconditional promise, in writing, to accept a bill before it is drawn, shall be deemed an actual acceptance in favor of every person to whom such written promise shall have been shown, and who upon the faith thereof shall have received the bill for a valuable consideration. Sec. 536. Every holder of a bill, presenting the same for acceptance, may require that the acceptance be written on the bill; and a refusal to comply with such request shall be deemed a refusal to accept, and the bill may be protested for non-acceptance. Sec. 537. The preceding sections shall not be construed to impair the right of any person to whom a promise to accept a bill may have been made, and who on the faith of such promise shall have drawn or negotiated the bill, to recover damages of the party making such promise, on his refusal to accept such bill." 1 Wag. St. 1872, p. 214; 1 Rev. St. Mo. 1879, p. 84; 1 Rev. St. Mo. 1889, p. 253.

why not on draw?

The contention of the plaintiffs in error is that the rights of the parties are to be determined by the law of the place where the alleged agreement was made. If this be so, it may be that the judgment could not be sustained; for the statute of Missouri expressly declares that no person within that state shall be charged as an acceptor of a bill of exchange unless his acceptance be in writing. And the statute, as construed by the highest court of Missouri, equally embraces within its inhibitions an action upon a parol promise to accept a bill, except as provided in section 537. Flato v. Mulhall, 72 Mo. 522, 526; Rousch v. Duff, 35 Mo. 312, 314. But, if the law of Missouri governs, this action could not be maintained under that section, because, as held in Flato v. Mulhall, above cited, the plaintiffs, being the payees in the bill drawn by Farlow upon Hall Bros. & Co., could not, within the meaning of the statute, be said to have "negotiated" it. The Missouri statute is a copy of a New York statute, in respect to which Judge Duer, in Blakiston v. Dudley, 5 Duer (N. Y.) 373, 377, said: "We think that to negotiate a bill can only mean to transfer it for value, and that it is a solecism to say that a bill has been negotiated by a payee who has never parted with its ownership or possession. The fact that the plaintiffs had given value for the bill when they

received it only proves its negotiation by the drawer—its negotiation to, and not by, them. * * * Their putting their names upon the back of the bill was not an indorsement, but a mere authority to the agent whom they employed to demand its acceptance and payment. The manifest intention of the legislature in section 10 [similar to section 537 of the Missouri statutes] was to create an exception in favor of those who, having transferred a bill for value, on the faith of the promise of the drawee to accept it, have, in consequence of his refusal to accept, been rendered liable, and been subjected to damages, as drawers or indorsers." The plaintiffs in error, therefore, cannot rest their case upon section 537.

We are, however, of opinion that, upon principle and authority, the rights of the parties are not to be determined by the law of Missouri. The statute of that state can have no application to an action brought to charge a person in Illinois upon a parol promise to accept and pay a bill of exchange payable in Illinois. The agreement to accept and pay, or to pay upon presentation, was to be entirely performed in Illinois, which was the state of the residence and place of business of the defendants. They were not bound to accept or pay elsewhere than at the place to which, by the terms of the agreement, the stock was to be shipped. Nothing in the case shows that the parties had in view, in respect to the execution of the contract, any other law than the law of the place of performance. That law, consequently, must determine the rights of the parties. Coghlan v. South Carolina R. Co., 142 U. S. 101, 12 Sup. Ct. 150, 35 L. Ed. 951, and the authorities there cited. In this connection it is well to state that in New York & Virginia State Stock Bank v. Gibson, 5 Duer, 583, a case arising under the statute of New York above referred to, the court said: "Those provisions manifestly embrace all bills, wherever drawn, that are to be accepted and paid within this state; and, were the terms of the statute less explicit than they are, the general rule of law would lead us to the same conclusion—that the validity of a promise to accept a bill of exchange depends upon the law of the place where the bill is to be accepted and paid." Citing Boyce v. Edwards, 4 Pet. 111, 7 L. Ed. 799.

Looking, then, at the law of Illinois, there is no difficulty in holding that the defendants were liable for a breach of their parol agreement, made in Missouri, to accept and pay, or to pay upon presentation, in Illinois, the bills drawn by Farlow, pursuant to that agreement, in favor of the plaintiffs. It was held in Scudder v. Union Nat. Bank, 91 U. S. 406, 413, 23 L. Ed. 245, that in Illinois a parol acceptance of, or a parol promise to accept, upon a sufficient consideration, a bill of exchange, was binding on the acceptor. Mason v. Dousay, 35 Ill. 424, 433, 85 Am. Dec. 368; Nelson v. First Nat. Bank, 48 Ill. 36, 40, 95 Am. Dec. 510; Sturges v. Fourth Nat. Bank, 75 Ill. 595; St. Louis Nat. Stock-Yards v. O'Reilly, 85 Ill. 546, 551.

The views we have expressed were substantially those upon which

the court below proceeded in its refusal of the defendants' requests for instructions, as well as in its charge to the jury. The suggestion that there was a material variance between the averments of the original and amended declaration, and the proof adduced by the plaintiffs, is without foundation. The real issue was fairly submitted to the jury, and their verdict must stand.

Judgment affirmed.[9]

UNITED STATES v. CROSBY.

(Supreme Court of the United States, 1812. 7 Cranch, 115, 3 L. Ed. 287.)

STORY, J. A writ of intrusion was brought by the United States against the defendant in error to recover possession of an undivided part of certain land lying within the district of Maine. Upon the trial of the cause in the District Court of that district, a special verdict was found by the jury, upon which the same court gave judgment in favor of the defendant in error. This judgment was afterwards affirmed in the Circuit Court of Massachusetts, and is now before the Supreme Court for a final decision.

By the special verdict it appears that the claim of the United States to the land in controversy is under one Nathaniel Dowse, who derived his title, if any, from an instrument stated at large in the same verdict, and executed in his favor by one John Nelson. The instrument is without a seal and was executed at the Island of Grenada, in the West Indies, before a notary public, according to the mode prescribed, by the existing laws, to pass real estate in that colony—and both parties were at that time residents therein.

By the laws of Massachusetts, no estate of freehold in land can be conveyed unless by a deed or conveyance under the hand and seal of the party—and to perfect the title as against strangers, it is further requisite that the deed should be acknowledged before a proper magis-

[9] See, also, Wilson v. Lewiston Mill Co., 150 N. Y. 314, 44 N. E. 959, 55 Am. St. Rep. 680 (1896).

In Worcester Bank v. Wells, 8 Metc. (Mass.) 107, 112 (1844), the court, per Wilde, J., said: "It was argued, for the plaintiffs, that the defendants' letter, promising to accept the bill, was not a completion of the contract, until it was received by the drawers, Farnum & Wright (in Massachusetts). But we do not so consider it. When the defendants agreed to their request, and put their letter in the mail, the contract, we think, was complete. If the defendants made any binding promise, it was made in New York, and to be performed there. A presentment of the bill here would not have been a good presentment. If the validity of the contract is to be determined by the law of New York, it is clear that the defendants are not liable as acceptors. By the statute referred to, a promise to accept in a letter, or on any other paper than the bill itself, is not an acceptance, where the party has not taken the bill on the faith of such promise. And it is agreed that this bill was discounted by the plaintiffs without any knowledge of the letter of acceptance."

As to mode of acceptance of a bill of exchange, see, in general, 61 L. R. A. 196–199.

trate, and recorded in the registry of deeds for the county where the land lies.

The question presented for consideration, is whether the lex loci contractus or the lex loci rei sitæ is to govern in the disposal of real estates.

The court entertain no doubt on the subject; and are clearly of opinion that the title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situate. The judgment of the Circuit Court must, therefore, be affirmed.[10]

[10] So as to power of attorney to convey land. Morris v. Linton, 61 Neb. 537, 85 N. W. 565 (1901); Linton v. Moorhead, 209 Pa. 646, 59 Atl. 264 (1904).

In a number of jurisdictions it is now provided by statute that the rule "locus regit actum" may be followed. Stimson, Am. St. Law, § 1568.

CONTINENTAL LAW.—*France.*—The rule that the formal requirements of a legal transaction must conform to the law of the state where the transaction takes place (locus regit actum) appears to have an imperative force. Cass. June 14, 1899 (S. 1900, 1, 225), and note by A. Pillet; Cass. Feb. 23, 1864 (S. 1864, 1, 385); Cass. Aug. 18, 1856 (D. 1857, 1, 39). There seems to be a tendency, however, in favor of the optional character of this rule. See App. Douai, Jan. 13, 1887 (S. 1890, 2, 148); Trib. Civ. Rouen, July 22, 1896; App. Rouen, May 7, 1898 (26 Clunet, 578). It is said to be applicable also to conveyances of and contracts relating to real estate. Weiss, Traité de droit int. privé, iv, 195–196. Matters concerning publicity (registration, etc.) must conform, however, to the law of the situs. Cass. Feb. 20, 1894 (22 Clunet, 615).

Certain requirements (called "formalités habilitantes") are deemed to relate to capacity and not to form; e. g., the necessity of a preliminary judicial authorization to the validity of a gift. App. Alger, May 2, 1898 (26 Clunet, 385).

Germany.—A compliance with either the lex loci or the law applicable to the substance of the transaction suffices. Transactions involving the creation or the transfer of real rights form an exception to this rule. Article 11, Law Intr. Civ. Code.

In 63 R. G. 18 (March 3, 1906), it seems to be held that the law of the situs will control the formal requirements of "obligatory" as well as "real" contracts with respect to immovables. See, however, note to case in 16 Niemeyer, 331.

See, also, Rundstein, Die Regel "locus regit actum" im Bürgerlichen Gesetzbuche, 20 Archiv für Bürgerliches Recht, 192–203.

Italy.—According to article 9, Prel. Disp. Civ. Code, it is sufficient that a legal transaction in formal respects complies with the law of the place where it is made, or with the common national law of the parties. This rule seems to apply also to conveyances of and contracts relating to real estate. See App. Genoa, Dec. 22, 1894 (Temi Genovese 1895, p. 82). It is held by some courts, however, that in view of article 1314, Civ. Code, a power of attorney relating to Italian real estate must conform to Italian law and be in writing. Cass. Turin, Aug. 24, 1892 (La Legge 1892, 2, 588); App. Palermo, Oct. 6, 1894 (23 Clunet, 910). Contra: Cass. Rome, March 21, 1887 (La Legge 1887, 2, 509). See, also, E. Naquet, La règle "locus regit actum" est-elle impérative ou facultative? 31 Clunet, 39–58; A. Lainé, Esquisse d'une théorie de la forme des actes instrumentaires en droit international privé, 35 Clunet, 321–343, 674–693.

PART II.

PARTICULAR SUBJECTS.

CHAPTER I.

PROPERTY.

SECTION 1.—IMMOVABLES.[1]

FRIERSON v. WILLIAMS.

(Supreme Court of Mississippi, 1879. 57 Miss. 451.)

GEORGE, C. J. The plaintiff in error filed his bill in the chancery court of Coahoma county against John Williams and his wife for the purpose of collecting out of the separate estate of Mrs. Williams a note for six thousand and fifty dollars, made by Williams and wife, in February, 1873, payable to the order of Williams, the husband, and by him indorsed to the plaintiff in error for money then advanced by the latter to said Williams. The note was made at New Orleans, in the state of Louisiana, where Williams and his wife reside. The property sought to be charged with the debt is land situated in Coahoma county, and is the separate estate of Mrs. Williams, under a devise made to her by her sister, Mrs. McGuire, who died in 1863. By her will she provided as follows: "My whole estate, real and personal, shall go to my sis-

[1] From an international standpoint tangible property is divided into movables and immovables, the latter including leasehold estates. Freke v. Lord Carbery [1873] L. R. 16 Eq. 461; In re Gentili, 1875, Ir. L. R. 9 Eq. 541; Duncan v. Lawson [1889] 41 Ch. D. 394; In re Moses [1908] 2 Ch. 235; Sneed v. Ewing, 5 J. J. Marsh. (Ky.) 460, 22 Am. Dec. 41 (1831). But see Despard v Churchill, 53 N. Y. 192 (1873). See, also, Dicey, Conflict of Laws, 74–77; Westlake, Priv. Int. Law, 206.

A state may impress upon movable things within its jurisdiction the character of immovables. McCollum v. Smith, Meigs (Tenn.) 342, 33 Am. Dec. 147 (1838). But such property will resume its natural attributes upon its removal from such jurisdiction. Minor v. Cardwell, 37 Mo. 350, 90 Am. Dec. 390 (1866). A state creating intangible property may assign to it for certain purposes a fictitious situs within the state. Tappan v. Merchants' Nat. Bank, 19 Wall. (U. S.) 490, 22 L. Ed. 189 (1873); Corry v. Baltimore, 196 U. S. 466, 25 Sup. Ct. 297, 49 L. Ed. 556 (1905).

ters, Ellen Mayes, wife of R. B. Mayes, and Louisa Williams, the wife of John Williams, for and during their natural lives; and this bequest is to their sole and separate use, in which their husbands respectively shall have no right or interest." The will then proceeds to dispose of the remainder, after the termination of the life estate, to the children of the two devisees.

[The learned Chief Justice discussed here the nature of the estate acquired by Mrs. Williams under the devise and continued as follows:]

It is next insisted that by the law of Louisiana the promissory note of the wife, made as surety for her husband, is void for want of the capacity of the wife to enter into such a contract, and that, being void by the lex loci contractus, it is void everywhere. This position is true, if the giving of the note has no other effect than what it purports to have on its face, viz., a personal obligation of the wife. But it is charged in the bill and admitted by the demurrer, that at the time this note was made in Louisiana the wife had a separate estate in realty, situated in this state, and that she contracted with reference to this separate estate, and intended to charge it by the promissory note in controversy. Whether this purpose can be carried out with reference to realty here, notwithstanding the fact that the note is void by the law of Louisiana, is the question presented for our consideration. The note, if made here, would be equally void by our laws to bind the wife personally; yet, notwithstanding this, it would be held, if made with the intent and purpose alleged in the bill, to be a valid charge against her separate estate situated here.

It is generally true that the capacity of a married woman to make a contract will be determined by the law of her domicile; but this is not the rule when her contract relates to her estate in realty, situated in another jurisdiction. Judge Story says: "The general principle of the common law is that the laws of the place where such [immovable] property is situated exclusively govern in respect to the rights of the parties, the modes of transfer, and the solemnities which should accompany them. The title, therefore, to real property can be acquired, passed, and lost only according to the lex rei sitæ." Story, Confl. Laws, § 424. And quoting from Sir William Grant: "The validity of every disposition of real estate must depend upon the law of the country in which that estate is situated;" he says: "The same rule would also seem equally to apply to express liens and to implied liens upon immovable estate." Mr. Burge, as quoted by Judge Story, in a note to section 445 of the same work, says: "The power to alienate immovable property by contract was a quality impressed on the property; that the law from which it was derived, or by which it is regulated, was a real law; and that the existence of this power and the validity of its exercise must be decided by the law of the country in which the property was situated." And it is said by a learned author: "No sovereignty can permit the intrusion on its soil of a foreign law. Such a law may be accepted by comity in cases in which a contested issue, the law ap-

plicable to which is foreign, comes up for determination in a home court. But the imposition of any other law than the lex rei sitæ as to property, would be to give foreign subjects and foreign laws an absolute control, unchecked by any discretion of the home courts, over a subject-matter essential not merely to the independence, but the vitality of the state. * * * The mischief is cured by the adoption of the rule lex rei sitæ regit; whoever may be the owner, or wherever the contract was made, the law of the land reigns. No other law, either as to the transfer or control of the property, is to intrude." Wharton, Confl. Laws, §§ 278, 280. These rules apply to marital rights in realty. Judge Story, after speaking of the rights of husband and wife as to personal property situated beyond the matrimonial domicile says: "But real or immovable property ought to be left to be adjudged by the lex rei sitæ as not within the reach of any extra-territorial law;" and in Vertner v. Humphreys, 14 Smedes & M. 130, 143, this court said that: "As to immovable property, the law of the place where it is situated fixes the rights of husband and wife in it."

The application of these principles will furnish a safe solution of the question under consideration. The capacity of Mrs. Williams to take this property, and her rights and powers over it, are derived from and regulated by the law of this state. Her power of disposition and dealing with it are, by our laws, impressed on the property itself. As to none of these things has the law of Louisiana the slightest influence. If she had made a contract expressly disposing of this property, it will not be denied that, though void by the laws of Louisiana, either for her want of capacity to act, or the want of the observances of the forms and solemnities prescribed by those laws, yet if valid by the law of this state, it would have been good. The contract here is not strictly of that character, yet the making of it is the exercise of the power of the wife to dispose of her estate; for whenever that power is denied, the power to charge it with her debts is denied also, and the charge can only be made effectual by the actual or threatened alienation of the estate, under a decree of the chancery court. The charging of her separate estate for the payment of money does not pass any actual interest in the land, but it is the first and essential step for a judicial disposition of the estate to satisfy the charge, and the exercise of a power of administration and control over it, which, as we have seen, is governed solely by the lex rei sitæ. To show that this is its true nature, we have only to suppose that, by the law of Louisiana, the note was a charge on her realty situated there, and was not by our law a charge on the realty situated here. In such a case, it would be evident that an attempt to enforce it here against her real estate could not succeed. If success could attend such an effort, then the several rights and powers of husband and wife, as to realty, would not be fixed and governed by the laws of the situs; and the act of a wife, done in a foreign state, would have the effect of disposing of her realty here, contrary to our laws.

But there is no real conflict between the laws of Louisiana and Mississippi in reference to the contract. By both laws the note is void for what it purports to be on its face—a personal obligation of the wife; and it is void for the same reason in both, viz., the personal incapacity of the wife. The difference between the two laws is as to the effect on the real property of the wife in the respective jurisdictions of the two states, and as to which, as we have above seen, the law of the state in which the realty is situated is the exclusive test. If the note had not been void by our laws, as the personal obligation of the wife, we should nevertheless, out of comity to a sister state, adjudge it void to that extent, if attempted to be enforced here; but the principle of comity does not require a state to regard the laws of any other state, so far as they may affect contracts in relation to real estate situated in the former state.

Decree reversed, demurrer overruled, and cause remanded.[2]

FESSENDEN v. TAFT.

(Supreme Court of New Hampshire, 1889. 65 N. H. 39, 17 Atl. 713.)

Notes & contracts gov. by law of place of making; Mtg, by law of situs rei sitae.

Bill in equity to foreclose a mortgage of land in New Hampshire, given to secure a promissory note for $4,000, made in Massachusetts by George Taft, and payable to the plaintiff; both Taft and the plaintiff being at the time residents of Massachusetts. The consideration of the note was in part a prior indebtedness of $2,200 from said Taft to the plaintiff, and it was agreed that the balance of $1,800 should be retained by the plaintiff until the release of an attachment upon the premises made in a suit brought by one Roberts against said Taft. Afterwards, said Roberts having prevailed in the suit, the plaintiff paid him the $1,800, and the attachment was dissolved. In pursuance of a verbal agreement between said Taft and the plaintiff, interest was reckoned and paid on the note at various rates higher than 6 per cent. during various periods ending April 28, 1883, when the last payment was made. Pub. St. Mass. 1882, c. 77, § 3, provides as follows: "When there is no agreement for a different rate, the interest of money shall be at the rate of six dollars upon each hundred dollars for a year, but it shall be lawful to pay, reserve, or contract for any rate of interest or of discount; but no greater rate than that before mentioned shall be recover-

Interest & usury laws are gov. by contract. ∴ place of making.

[2] The validity of every disposition of real estate depends upon the law of the state in which the property is situated; e. g., the validity of a mortgage. Goddard v. Sawyer, 9 Allen (Mass.) 78 (1864). Or the validity of a trust. Seaman v. Cook, 14 Ill. 501 (1853); Acker v. Priest, 92 Iowa, 610, 61 N. W. 235 (1894). So as to what constitutes delivery of a deed. Freeland v. Charnley, 80 Ind. 132 (1881). It determines, also, the nature of the interest created. Gault v. Van Zile, 37 Mich. 22 (1877); In re Kellogg (D. C.) 113 Fed. 120 (1902), affirmed 121 Fed. 333, 57 C. C. A. 547 (1903). And the effect of the instrument. McGoon v. Scales, 9 Wall. (U. S.) 23, 19 L. Ed. 545 (1869); Robards v. Marley, 80 Ind. 185 (1881); Bronson v. St. Croix Lumber Co., 44 Minn. 348, 46 N. W. 570 (1890).

ed in any action, unless the agreement to pay such greater rate is in writing." [3]

CLARK, J. The note, being a Massachusetts contract, is governed by the law of Massachusetts. The mortgage, although executed in Massachusetts by citizens of that state, being a conveyance of land in New Hampshire, is controlled by the law of New Hampshire. The consideration of the note being an indebtedness of the maker to the payee of $2,200, and a promise of the payee to pay to the maker $1,800 when the mortgaged premises were released from attachment, was sufficient, and the mortgage is valid by the law of New Hampshire. The amount of the advance ($1,800), the contingency upon which it was to be made, and the obligation of the mortgagee to make it, were definitely agreed upon at the execution and delivery of the note and mortgage, and the agreement was afterwards performed, and the mortgage is not within the New Hampshire statute prohibiting mortgages to secure future advances. Stearns v. Bennett, 48 N. H. 400; Abbott v. Thompson, 58 N. H. 256.[4] The law of Massachusetts allowed the parties to contract for any rate of interest, (St. Mass. 1867, c. 56, § 2,) and the payments of interest at the rate agreed upon were legal and binding. Marvin v. Mandell, 125 Mass. 562. It is immaterial that the agreement was not in writing. The statute does not declare such an agreement illegal; it merely declares "that no greater rate of interest than six per centum per annum shall be recovered in any action, except when the agreement to pay such greater rate of interest is in writing." The question is not whether, under the law of Massachusetts, an oral executory agreement to pay interest at a higher rate than 6 per cent. can be enforced by action, but whether such an agreement is valid when fully executed. Money paid as usurious interest is allowed to be recovered back on the theory that the law regards the payment as made under duress, (Albany v. Abbott, 61 N. H. 158,) but the general rule is that payments voluntarily made, with a full knowledge of all material facts, cannot be recovered back, even though made upon an illegal consideration, which the law would not enforce. Caldwell v. Wentworth, 14 N. H. 431. * * * The plaintiff is entitled to a decree of foreclosure of the mortgaged premises, excepting therefrom the barn on the Jordan lot, for the amount due on the mortgage note, being the sum of $3,300, with interest at 6 per cent. from April 28, 1883. Decree accordingly.[5]

[3] A part of the reporter's statement of facts and of the opinion, not relating to the Conflict of Laws, has been omitted.

[4] The statute provided as follows: "No estate conveyed in mortgage shall be holden by the mortgagee for the payment of any sum of money, or the performance of any other thing, the obligation or liability to the payment or performance of which arises, is made or contracted after the execution and delivery of such mortgage." Rev. St. N. H. 1842, c. 131, § 3.

[5] Nor will the situs as such govern the question of damages for the breach of a contract made in one state for the purchase of land located in another state. Atwood v. Walker, 179 Mass. 514, 61 N. E. 58 (1901), ante, p. 78; Finnes v. Selover, Bates & Co., 102 Minn. 334, 113 N. W. 883 (1907).

D made a valid contract, by laws of N.C., with his wife (P's intestate) to release his marital rights in her property in Mass. Both parties domiciled in N.C. at time they made contract.

By law of Mass. they could not make such a contract.

POLSON v. STEWART.

(Supreme Judicial Court of Massachusetts, 1897. 167 Mass. 211, 45 N. E. 737, 36 L. R. A. 771, 57 Am. St. Rep. 452.)

Held: Contract valid when made;

and not impossible of execution when to be performed;

∴ decreed.

HOLMES, J.[6] This is a bill to enforce a covenant made by the defendant to his wife, the plaintiff's intestate, in North Carolina, to surrender all his marital rights in certain land of hers. The land is in Massachusetts. The parties to the covenant were domiciled in North Carolina. According to the bill, the wife took steps which, under the North Carolina statutes, gave her the right to contract as a feme sole with her husband as well as with others, and afterwards released her dower in the defendant's lands. In consideration of this release, and to induce his wife to forbear suing for divorce, for which she had just cause, and for other adequate considerations, the defendant executed the covenant. The defendant demurs.

Comment: Good.

The argument in support of the demurrer goes a little further than is open on the allegations of the bill. It suggests that the instrument which made the wife a "free trader," in the language of the statute, did not go into effect until after the execution of the release of dower and of the defendant's covenant. But the allegation is that the last-mentioned two deeds were executed after the wife became a free trader, as they probably were in fact, notwithstanding their bearing date earlier than the registration of the free trader instrument. We must assume that at the date of their dealings together the defendant and his wife had as large a freedom to contract together as the laws of their domicile could give them.

But it is said that the laws of the parties' domicile could not authorize a contract between them as to lands in Massachusetts. Obviously, this is not true. It is true that the laws of other states cannot render valid conveyances of property within our borders which our laws say are void, for the plain reason that we have exclusive power over the res. Ross v. Ross, 129 Mass. 243, 246, 37 Am. Rep. 321; Hallgarten v. Oldham, 135 Mass. 1, 7, 8, 46 Am. Rep. 433. But the same reason inverted establishes that the lex rei sitæ cannot control personal covenants not purporting to be conveyances, between persons outside the jurisdiction, although concerning a thing within it. Whatever the covenant, the laws of North Carolina could subject the defendant's property to seizure on execution, and his person to imprisonment, for a failure to perform it. Therefore, on principle, the law of North Carolina determines the validity of the contract. Such precedents as there are, are on the same side. The most important intimations to the contrary which we have seen are a brief note in Story, Confl. Laws, § 436, and the doubts expressed in Mr. Dicey's very able and valuable book. Lord Cottenham stated and enforced the rule in the clearest way in Ex parte Pollard, 4 Deac. 27, 40, et seq.; Id., Mont.

Pg. 1.

[6] The statement of facts and a part of the opinion not relating to the Conflict of Laws have been omitted.

& C. 239, 250. So Lord Romilly, in Cood v. Cood, 33 Beav. 314, 322. So in Scotland, in a case like the present, where the contract enforced was the wife's. Findlater v. Seafield (Feb. 8, 1814) 17 Fac. Col. 553. See, also, Cuninghame v. Semple, 6 Mor. Dict. 4462; Ersk. Inst. bk. 3, tit. 2, § 40; Westl. Priv. Int. Law (3d Ed.) § 172; Ror. Int. St. Law (2d Ed.) 289.

If valid by the law of North Carolina, there is no reason why the contract should not be enforced here. The general principle is familiar. Without considering the argument addressed to us that such a contract would have been good in equity if made here (Holmes v. Winchester, 133 Mass. 140; Jones v. Clifton, 101 U. S. 225, 25 L. Ed. 908; Bean v. Patterson, 122 U. S. 496, 499, 7 Sup. Ct. 1298, 30 L. Ed. 1126), we see no ground of policy for an exception. The statutory limits which have been found to the power of a wife to release dower (Mason v. Mason, 140 Mass. 63, 3 N. E. 19; Peaslee v. Peaslee, 147 Mass. 171, 181, 17 N. E. 506), do not prevent a husband from making a valid covenant that he will not claim marital rights with any person competent to receive a covenant from him (Charles v. Charles, 8 Grat. [Va.] 486, 56 Am. Dec. 155; Logan v. Birkett, 1 Mylne & K. 220; Marshall v. Beall, 6 How. [U. S.] 70, 12 L. Ed. 347). The competency of the wife to receive the covenant is established by the law of her domicile, and of the place of the contract. The laws of Massachusetts do not make it impossible for him specifically to perform his undertaking. He can give a release which will be good by Massachusetts law. If it be said that the rights of the administrator are only derivative from the wife, we agree, and we do not for a moment regard any one as privy to the contract except as representing the wife. But, if then it be asked whether she could have enforced the contract during her life, an answer in the affirmative is made easy by considering exactly what the defendant undertook to do. So far as occurs to us, he undertook three things: First, not to disturb his wife's enjoyment while she kept her property; second, to execute whatever instrument was necessary in order to release his right if she conveyed; and third, to claim no rights on her death, but to do whatever was necessary to clear the title from such rights then. All these things were as capable of performance in Massachusetts as they would have been in North Carolina. Indeed, all the purposes of the covenant could have been secured at once in the lifetime of the wife by a joint conveyance of the property to a trustee upon trusts properly limited.

It will be seen that the case does not raise the question as to what the common law and the presumed law of North Carolina would be as to a North Carolina contract calling for acts in Massachusetts, or concerning property in Massachusetts, which could not be done consistently with Massachusetts law. * * *

Demurrer overruled.

FIELD, C. J. (dissenting). I cannot assent to the opinion of a majority of the court. By our law, husband and wife are under a general disability or incapacity to make contracts with each other. The deci-

sion in Whitney v. Closson, 138 Mass. 49, shows, I think, that the contract sued on would not be enforced if the husband and wife had been domiciled in Massachusetts when it was made. As a conveyance made directly between husband and wife of an interest in Massachusetts land would be void although the parties were domiciled in North Carolina when it was made, and by the laws of North Carolina were authorized to make such a conveyance, so I think that a contract for such a conveyance between the same persons also would be void. It seems to me illogical to say that we will not permit a conveyance of Massachusetts land directly between husband and wife, wherever they may have their domicile, and yet say that they may make a contract to convey such land from one to the other, which our courts will specifically enforce. It is possible to abandon the rule of lex rei sitæ, but to keep it for conveyances of land and to abandon it for contracts to convey land seems to me unwarrantable.

The question of the validity of a mortgage of land in this commonwealth is to be decided by the law here, although the mortgage was executed elsewhere, where the parties resided, and would have been void if upon land there situated. Goddard v. Sawyer, 9 Allen, 78. "It is a settled principle that 'the title to and the disposition of real estate must be exclusively regulated by the law of the place in which it is situated.'" Cutter v. Davenport, 1 Pick. 81, 11 Am. Dec. 149; Osborn v. Adams, 18 Pick. 245. The testamentary execution of a power of appointment given by will in relation to land is governed by the lex situs, or the law of the domicile of the donor of the power. Sewall v. Wilmer, 132 Mass. 131.

The plaintiff, merely as administrator, cannot maintain the bill. Caverly v. Simpson, 132 Mass. 462, 464. The plaintiff must proceed on the ground that Mrs. Henry Stewart, Jr., acquired by the instruments executed in North Carolina the right to have conveyed or released to her and her heirs by her husband all the interest he had as her husband in her lands in Massachusetts; that this right descended on her death to her heirs, according to the law of Massachusetts; and that the plaintiff, being an heir, has acquired the interest of the other heirs, and therefore brings the bill as owner of this right. The plaintiff, as heir, claims by descent from Mrs. Stewart, and, if the contract sued on is void as to her, it is void as to him. It is only on the ground that the contract conveyed an equitable title that the plaintiff, as heir, has any standing in court. His counsel founds his argument on the distinction between a conveyance of the legal title to land and a contract to convey it. If the instrument relied on purported to convey the legal title, his counsel in effect admits that it would be void by our law. He accepts the doctrine stated in Ross v. Ross, 129 Mass. 243, 246, 37 Am. Rep. 321, as follows: "And the validity of any transfer of real estate by act of the owner, whether inter vivos or by will, is to be determined, even as regards the capacity of the grantor or testator, by the law of the state in which the land is situated." As a contract purporting to convey a right

in equity to obtain the legal title to land, he contends that it is valid. I do not dispute the cases cited with reference to contracts concerning personal property; but the rule at common law in regard to the capacity of parties to make contracts concerning real property, as I read the cases and text-books, is that the lex situs governs. Cochran v. Benton, 126 Ind. 58, 25 N. E. 870; Doyle v. McGuire, 38 Iowa, 410; Sell v. Miller, 11 Ohio St. 331; Johnston v. Gawtry, 11 Mo. App. 322; Frierson v. Williams, 57 Miss. 451. Dicey on the Conflict of Laws is the latest text-book on the subject. He states the rule as follows:

Page lxxxix.: "(B) Validity of Contract. (i) Capacity. Rule 146. Subject to the exceptions hereinafter mentioned, a person's capacity to enter into a contract is governed by the law of his domicile (lex domicilii) at the time of the making of the contract: (1) If he has such capacity by that law, the contract is, in so far as its validity depends upon his capacity, valid. (2) If he has not such capacity by that law, the contract is invalid. Exception 1: A person's capacity to bind himself by an ordinary mercantile contract is (probably) governed by the law of the country where the contract is made (lex loci contractus) (?). Exception 2: A person's capacity to contract in respect of an immovable (land) is governed by the lex situs."

Page xcii.: "(A) Contracts with Regard to Immovables. Rule 151. The effect of a contract with regard to an immovable is governed by the proper law of the contract (?). The proper law of such contract is, in general, the law of the country where the immovable is situate (lex situs)."

On page 517 et seq. he states the law in the same way, with numerous illustrations, but with some hesitation as to the law governing the forms of contracts to convey immovables. See page xc., rule 147, exception 1. For American notes with cases, see page 527 et seq. In the Appendix (page 769, note B) he discusses the subject at length, and with the same result. Some of the cases cited are the following: Succession of Larendon, 39 La. Ann. 952, 3 South. 219; Besse v. Pellochoux, 73 Ill. 285, 24 Am. Rep. 242; Fuss v. Fuss, 24 Wis. 256, 1 Am. Rep. 180; Moore v. Church, 70 Iowa, 208, 30 N. W. 855, 55 Am. St. Rep. 439; Heine v. Mechanics' & Traders' Ins. Co., 45 La. Ann. 770, 13 South. 1; First Nat. Bank v. Hughes, 10 Mo. App. 7; Ordronaux v. Rey, 2 Sandf. Ch. (N. Y.) 33; Adams v. Clutterbuck, 10 Q. B. Div. 403; Chapman v. Robertson, 6 Paige (N. Y.) 627, 630, 31 Am. Dec. 264.

Phillimore states the law as follows (4 Phillim. Int. Law, 3d Ed., p. 596):

"DCCXXXV. (1) The case of a contract respecting the transfer of immovable property illustrates the variety of the rules which the foreign writers upon private international law consider applicable to a contract to which a foreigner is a party: They say that: (i) The capacity of the obligor to enter into the contract is determined by refer-

ence to the law of his domicile. (ii) The like capacity of the obligee by the law of his domicile. (iii) The mode of alienation or acquisition of the immovable property is to be governed by the law of the situation of that property. (iv) The external form of the contract is to be governed by the law of the place in which the contract is made. It is even suggested by Fœlix that sometimes the interpretation of the contract may require the application of a fifth law.

"DCCXXXVI. The law of England and the law of the North American United States require the application of the lex rei sitæ to all the four predicaments mentioned in the last section.

"DCCXXXVII. But a distinction is to be taken between contracts to transfer property and the contracts by which it is transferred. The former are valid if executed according to the lex loci contractus; the latter require for their validity a compliance with the forms prescribed by the lex rei sitæ. Without this compliance, the dominium in the property will not pass."

To the same effect as to the capacity of the parties are Nels. Priv. Int. Law, 147, 260; Ratt. Priv. Int. Law, 128; Whart. Confl. Laws (2d Ed.) § 296; Story, Confl. Laws (8th Ed.) §§ 424–431, 435; Ror. Int. St. Law, 263. See Westl. Priv. Int. Law (3d Ed.) §§ 156, 167, et seq.

On reason and authority I think it cannot be held that, although a deed between a husband and his wife domiciled in North Carolina, of the rights of each in the lands of the other in Massachusetts, is void as a conveyance by reason of the incapacity of the parties under the law of Massachusetts to make and receive such a conveyance to and from each other, yet, if there are covenants in the deed to make a good title, the covenants can be specifically enforced by our courts, and a conveyance compelled, which, if voluntarily made between the parties, would be void. I doubt if all of the instruments relied on have been executed in accordance with the statutes of North Carolina. By section 1828 of the Statutes of that state, set out in the papers, the wife became a free trader from the time of registration. This, I understand, is January 7, 1893. Exhibit B purports to have been executed before that time, to wit, January 4, 1893. There does not appear to have been any examination of the wife separate and apart from her husband, as required by section 1835. If Exhibit B fails, there is at least a partial failure of consideration for Exhibit C. It is said that an additional consideration is alleged, viz. the wife's forbearing to bring a suit for divorce. Whether this last is a sufficient consideration for a contract, I do not consider. It is plain enough that there was an attempt on the part of the husband and wife to continue to live separate and apart from each other without divorce, and to release to each other all the property rights each had in the property of the other. If the release of one fails, I think that this court should not specifically enforce the release of the other. Mutuality in this respect is of the essence of the transaction. If the husband owned lands in Massachusetts, and had died before his wife, I do not think that Exhibit B, even if it were

executed according to the statutes of North Carolina, and the wife duly examined, and a certificate thereof duly made, would bar her of her dower. Our statutes provide how dower may be barred. Pub. St. c. 124, §§ 6–9. Exhibit B is not within the statute. See Mason v. Mason, 140 Mass. 63, 3 N. E. 19. Antenuptial contracts have been enforced here in equity so as to operate as a bar of dower, even if they did not constitute a legal bar. Jenkins v. Holt, 109 Mass. 261. But postnuptial contracts, so far as I am aware, never have been enforced here so as to bar dower, unless they conform to the statutes. Whitney v. Closson, 138 Mass. 49. Whatever may be true of contracts between husband and wife made in or when they are domiciled in other jurisdictions, so far as personal property or personal liability is concerned, I think that contracts affecting the title to real property situate within the commonwealth should be such as are authorized by our laws. I am of opinion that the bill should be dismissed.[7]

SECTION 2.—MOVABLES.

I. TANGIBLE.

7 are insurers
2 are buyers of a cargo, sold at auction in Norway, etc.

CAMMELL v. SEWELL.

(In the Exchequer Chamber, 1860. 5 Hurl. & N. 728.)

Trover for deals, with a count for money had and received. At the trial a verdict was taken for the plaintiffs, subject to a special case.

The material facts were in substance as follows: The plaintiffs are underwriters at Hull; the defendants, merchants in London. The action is brought to recover a part of a cargo of deals shipped on board a Prussian ship at Onega, Russia, by the Onega Wood Company, for

Query: was sale able to give 2 a good title?

Held: yes.

[7] As to law governing covenants in a deed, see Fisher v. Parry, 68 Ind. 465 (1879); Bethell v. Bethell, 54 Ind. 428, 23 Am. Rep. 650 (1876); Oliver v. Loye, 59 Miss. 320 (1881); Succession of Cassidy, 40 La. Ann. 827, 5 So. 292 (1888); Dalton v. Taliafero, 101 Ill. App. 592 (1902).

MECHANICS' LIENS.—The existence of a mechanic's lien for building materials is determined by the law of the situs of the land, and not by the law of the state in which the contract under which the materials are furnished is made. Campbell v. Coon, 149 N. Y. 556, 44 N. E. 300, 38 L. R. A. 410 (1896). Compare Midland Valley R. Co. v. Moran Bolt & Nut Mfg. Co., 80 Ark. 399, 97 S. W. 679 (1906).

CONTINENTAL LAW.—It is admitted that, excepting questions of capacity and form, the situs of realty will necessarily govern the creation of real rights therein. No rights can therefore be created which are either unknown to the law of the situs or are otherwise opposed to its public order. *France*, Cass. April 4, 1881 (S. 1883, 1, 65), and note by L. Renault.

The law of the situs determines also whether the property is to be deemed movable or immovable. *France*, Cass. April 5, 1887 (16 Clunet, 827); Trib. Civ. Seine, March 14, 1894 (21 Clunet, 815).

Messrs. Simpson & Whaplate, of Hull, and by them insured with the plaintiffs for £1,150.

The vessel in the course of her voyage went ashore near a place called Molde in Norway. The cargo was sold at public auction at Molde by the master of the vessel against the protest of Jervell, a representative of Messrs. Simpson & Whaplate, and was bought by Hans Clausen. Suit was brought by Jervell in the Diocesan Court of Trondjhem to set aside the sale, but failed.

A considerable portion of the cargo was shipped for London under a bill of lading, deliverable to the order of Hans Clausen, and by him indorsed to the defendants, who had made advances on the cargo. Defendants sold the cargo at public auction, the net proceeds received by them being £1,470. 4s. 2d. The damage sought to be recovered in the present action is that sum, with interest.

Plaintiffs, who upon the abandonment of the cargo to them by Simpson & Whaplate had paid them as for total loss, thereupon brought this action against the defendants for the recovery of the above sum, with interest.

There was evidence that by the law of Norway a sale by the master would transfer the property in the cargo.

The Court of Exchequer, Martin, B., delivering the opinion, held that the parties to the suit were concluded by the judgment of the Diocesan Court of Trondjhem. It ordered the verdict for the plaintiff to be set aside and a verdict to be entered for the defendants. Writ of error by plaintiffs to the Exchequer Chamber.[8]

CROMPTON, J.[9] In this case the majority of the court are of opinion that the judgment of the Court of Exchequer should be affirmed. At the same time we are by no means prepared to agree with the Court of Exchequer in thinking the judgment of the Diocesan Court in Norway conclusive as a judgment in rem, nor are we satisfied that the defendants in the present action were estopped by the judgment of that court or what was relied on as a judicial proceeding at the auction. It is not, however, necessary for us to express any decided opinion on these questions, as we think that the case should be determined on the real merits as to the passing of the property.

If we are to recognize the Norwegian law, and if according to that law the property passed by the sale in Norway to Clausen as an innocent purchaser, we do not think that the subsequent bringing the property to England can alter the position of the parties. The difficulty which we have felt in the case principally arises from the mode in which the evidence is laid before us in the mass of papers and depositions contained in the appendix.

We do not see evidence in the case sufficient to enable us to treat the transaction as fraudulent on the part of Clausen, although there are

[8] This statement of facts has been substituted for that of 3 Hurl. & N. 617.

[9] The dissenting opinion of Byles, J., has been omitted.

circumstances which would have made it better for him not to have become the purchaser. Treating him, therefore, as an innocent purchaser, it appears to us that the questions are—did the property by the law of Norway vest in him as an innocent purchaser? and are we to recognize that law? The question of what is the foreign law is one of fact, and here again there is great difficulty in finding out from the mass of documents what is the exact state of the law. The conclusion which we draw from the evidence is, that by the law of Norway the captain, under circumstances such as existed in this case, could not, as between himself and his owners, or the owners of the cargo, justify the sale, but that he remained liable and responsible to them for a sale not justified under the circumstances; whilst, on the other hand, an innocent purchaser would have a good title to the property bought by him from the agent of the owners.

It does not appear to us that there is anything so barbarous or monstrous in this state of the law as that we can say that it should not be recognized by us. Our own law as to market overt is analogous; and though it is said that much mischief would be done by upholding sales of this nature, not justified by the necessities of the case, it may well be that the mischief would be greater if the vendee were only to have a title in cases where the master was strictly justified in selling as between himself and the owners. If that were so, purchasers, who seldom can know the facts of the case, would not be inclined to give the value, and on proper and lawful sales by the master the property would be in great danger of being sacrificed.

There appears nothing barbarous in saying that the agent of the owners, who is the person to sell, if the circumstances justify the sale, and who must, in point of fact, be the party to exercise his judgment as to whether there should be a sale or not, should have the power of giving a good title to the innocent purchaser, and that the latter should not be bound to look to the title of the seller. It appears in the present case that the one purchaser bought the whole cargo; but suppose the farmers and persons in the neighbourhood at such a sale buy several portions of the goods, it would seem extremely inconvenient if they were liable to actions at the suit of the owners, on the ground that there was no necessity for the sale. Could such a purchaser coming to England be sued in our courts for a conversion, and can it alter the case if he resell, and the property comes to this country?

Many cases were mentioned in the course of the argument, and more might be collected, in which it might seem hard that the goods of foreigners should be dealt with according to the laws of our own or of other countries. Amongst others our law as to the seizure of a foreigner's goods for rent due from a tenant, or as to the title gained in them, if stolen, by a sale in market overt, might appear harsh. But we cannot think that the goods of foreigners would be protected against such laws, or that if the property once passed by virtue of

them it would again be changed by being taken by the new owner into the foreigner's own country. We think that the law on this subject was correctly stated by the Lord Chief Baron in the course of the argument in the court below, where he says "if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere." And we do not think that it makes any difference that the goods were wrecked, and not intended to be sent to the country where they were sold. We do not think that the goods which were wrecked here would on that account be the less liable to our laws as to market overt, or as to the landlord's right of distress, because the owner did not foresee that they would come to England.

Very little authority on the direct question before us has been brought to our notice. The only case which seems at variance with the principles we have enunciated is the case of The Eliza Cornish or Segredo, 1 Eccl. & Adm. 36, before the judge of the Court of Admiralty. If this case be an authority for the proposition that a law of a foreign country of the nature of the law of Norway, as proved in the present case, is not to be regarded by the courts of this country, and that its effect as to passing property in the foreign country is to be disregarded, we cannot agree with the decision; and, with all the respect due to so high an authority in mercantile transactions, we do not feel ourselves bound by it when sitting in a Court of Error. We must remark also, that in the case of Freeman v. East India Company, 5 B. & Ald. 617 (E. C. L. R. vol. 7), the Court of Queen's Bench appears to have assented to the proposition that the Dutch law, as to market overt, might have had the effect of passing the property in such case if the circumstances of the knowledge of the transaction had not taken the case out of the provisions of such law.

In the present case, which is not like the case of Freeman v. East India Company, the case of an English subject purchasing in an English colony property which he was taken to know that the vendor had no authority to sell, we do not think that we can assume on the evidence that the purchase was made with the knowledge that the sellers had no authority, or under such circumstances as to bring the case within any exception to the foreign law, which seems to treat the master as having sufficient authority to sell, so as to protect the innocent purchaser where there is no representative of the real owner. It should be remarked also, that Lord Stowell in the passage, cited in the case of Freeman v. East India Company, from his judgment in the case of The Gratitudine, states that if the master acts unwisely in his decision as to selling still the foreign purchaser will be safe under his acts. The doctrine of Lord Stowell agrees much more with the principles on which our judgment proceeds than with those reported to have been approved of in the case of The Eliza Cornish, as, on the evidence before us, we cannot treat Clausen otherwise than as an innocent purchaser, and as the law of Norway appears to us, on

the evidence, to give a title to an innocent purchaser, we think that the property vested in him, and in the defendants as subpurchasers from him, and that, having once so vested, it did not become divested by its being subsequently brought to this country, and, therefore, that the judgment of the Court of Exchequer should be affirmed.

COCKBURN, C. J. Concurring in the judgment delivered by my Brother CROMPTON, it further appears to me that the case may also be put upon another and a shorter ground.

Although the goods in question were at one time the property of English owners, the property in them was transferred to others by a sale valid according to the law of Norway, a country in which the goods were at the time of such sale.

Even if it were admitted, for the purpose of argument, that by the law of the country to which the ship belonged the master would not have had the power to dispose of the ship or cargo in case of wreck, which the law of Norway gives in such a case, and that the law of Norway would be overridden by the law of the nation to which the ship belonged, then it is to be observed that, the ship having been a Prussian ship, and the carriers, the shipowners, Prussians, and the goods having been shipped in Russia, the power of the master must depend on the law either of the country to which the ship belonged, or of the place where the contract to carry was entered into. The law of England, never having attached to the goods, as they never were on board an English vessel or reached British territory, cannot apply to the case. The law of nations cannot determine the question, for the international law is by no means uniform as to the powers of a master, as abundantly appeared from the various codes which were brought to our notice during the argument. But no evidence was adduced to show what was the law of Prussia or that of Russia in the matter in question.

The case therefore stands nakedly thus—a good contract of sale to transfer the property in Norway, without anything to show that by the general law of nations, or by the law of any nation which can possibly apply to the present case, the sale valid in Norway can be invalidated elsewhere.[10]

OLIVIER v. TOWNES.

(Supreme Court of Louisiana, 1824. 2 Mart. [N. S.] 93.)

Defendant, John D. Townes, owned one-half interest in the vessel Averick, which arrived in the port of New Orleans on July 22, 1823. The vessel which was insured by the Louisiana State Insurance Company was lost on the way to Liverpool. A creditor of Townes thereupon brought this action by attachment, praying that the attachment

[10] See, also, Inglis v. Usherwood, 1 East, 515 (1801), and Alcock v. Smith, [1892] 1 Ch. 238. Compare Northwestern Bank v. Poynter, [1895] A. C. 56.

be levied on the debt owing to Townes by the insurance company and that the company be made a garnishee. The attachment was levied, and in its answer the garnishee set up that the interest of Townes in the vessel had been conveyed to R. C. Ward & Co., who intervened in the action. The bill of sale was executed by Townes in the state of Virginia on July 24, 1823, and contained a clause that the vessel was to be delivered in Liverpool. The court below gave judgment for Ward & Co., and the petitioners appealed.[11]

PORTER, J.[12] * * * On the facts, therefore, we have presented the case of a creditor attaching property of his debtor, before it was transferred by sale and delivery, and it has been so repeatedly decided in this court that this may be done, and that nothing short of actual delivery will defeat this right, that it would be sufficient to refer to this jurisprudence as settling the right of the parties now before us, were it not for the great pains taken by the counsel to show that this doctrine is incorrect, if extended to cases when the vendor and vendee both live in a country where a different rule on the subject of the sale of movable property prevails.

This point is not new. It was taken in the case of Thuret v. Jenkins, 7 Mart. 318, 12 Am. Dec. 508, and after a very close attention to the arguments now urged by the counsel, and the authorities relied on, we are obliged to confess that we prefer the reasoning and the law which the counsel for the appellee favored us with in the case just cited, when his professional duty required him to support the opposite doctrine from that for which he now contends.

The position assumed in the present case is that by the laws of all civilized countries, the alienation of movable property, must be determined according to the laws, rules and regulations in force where the owner's domicile is situated: hence it is insisted that, as by the law existing in the state where the vendor lived, no delivery was necessary to complete the sale, it must be considered as complete here, and that it is a violation of the principle just referred to, to apply to the contract, rules which are peculiar to our jurisprudence, and different from those contemplated by the parties to the contract.

We readily yield an assent to the general doctrine for which the appellee contends. He has supported it by a variety of authorities drawn from different systems of jurisprudence. But some of those very books furnish also the exception on which we think this case must be decided, namely, that "when those laws clash with and interfere with the rights of the citizen of the countries where the parties to the contract seek to enforce it, as one or other of them must give way, those prevailing where the relief is sought must have the preference." Such is the language of the English book to which we have been referred, and Huberus, whose authority is more frequently resorted to on this

[11] The statement of facts has been abstracted from the opinion.

[12] A part of the opinion has been omitted.

subject than any other writer, because he has treated it more extensively and with greater ability, tells us in his treatise De Conflictu Legum: "Effecta contractuum certo loco initorum, pro jure loci illius alibi quoque observantur si nullum inde civibus alienis creetur prejudicium, en jure sibi quæsito." "The effects of a contract entered into at any place will be allowed according to the law of that place, in other countries, if no inconvenience results therefrom, to the citizens of that other country with respect to the law which they demand." This distinction appears to us founded on the soundest reasons. The municipal laws of a country have no force beyond its territorial limits and when another government permits these to be carried into effect within her jurisdiction, she does so upon a principle of comity. In doing so care must be taken that no injury is inflicted on her own citizens, otherwise justice would be sacrificed to courtesy, nor can the foreigner or stranger complain of this. If he sends his property within a jurisdiction different from that where he resides, he impliedly submits it to the rules and regulations in force in the country where he places it. What the law protects it has a right to regulate. A strong evidence of this is furnished by the doctrine in regard to successions. The general principle is, that the personal property must be distributed according to the law of the state where the testator dies, but so far as it concerns creditors, it is governed by the law of the country where the property is situated. If an Englishman or a Frenchman die abroad and leaves effects here, we regulate the order in which his debts are paid, by our jurisprudence, not that of his domicile. * * *

We proceed to examine whether giving effect to the law of Virginia, on the contract now set up, would be working an injury to this state, or its citizens. In doing this we must look to the general doctrine, and the effect it would have on our ordinary transactions, as well as its operation in this particular case. If we held here that this sale can defeat the attachment, we should, on the same principle, be obliged to decide that the claimant would hold the object sold in preference to a second purchaser to whom it was delivered. The rule being, that when the debtor can sell and give to the buyer a good title, the creditor can seize, or in other words where the first sale is not complete as to third persons, the creditor may attach and acquire a lien. McNeill v. Glass, 1 Mart. (N. S.) 261. In relation to movable property, our law has provided that delivery is essential to complete the contract of sale as to third parties. This valuable provision by which all our citizens are bound in their dealings, protects them from the frauds to which they would be daily subject, were they liable to be affected by previous contracts not followed by the giving of possession. The exemption contended for here, in behalf of the residents of another state, would deprive them of that protection wherever their rights, as purchasers, came in contact with strangers, a protection which it may be remarked, it is of the utmost importance, owing to our peculiar position, we should carefully maintain. This

city is becoming a vast storehouse for merchandise sent from abroad, owned by nonresidents, and deposited here for sale, and our most important commercial transactions are in relation to property so situated. If the purchasers of it should be affected by all the previous contracts made at the owner's domicile, although unaccompanied by delivery, it is easy to see to what impositions such a doctrine would lead, to what inconvenience it would expose us, and how severely it would check and embarrass our dealings. However anxious we may be to extend courtesy, and afford protection to the people of other countries who come themselves, or send their property within our jurisdiction, we cannot indulge our feelings so far as to give a decision that would let in such consequences as we have just spoken of. It would be giving to the foreign purchaser an advantage which the resident has not, and that, frequently, at the expense of the latter. This, in the language of the law, we think would be a great inconvenience to the citizens of this state, and therefore we cannot sanction it.

On looking into the record, for the purpose of giving final judgment, we observe that the proceedings have been carried on below without an attorney being appointed to represent the absent debtor. The case must therefore be remanded for trial between the petitioner and defendant.

It is therefore ordered, adjudged, and decreed, that the judgment of the parish court be annulled, avoided, and reversed, and that the claim of the intervening creditor be overruled, and that the case be remanded for a new trial between the petitioner and defendant, the appellee paying costs of this appeal.

SCHMIDT v. PERKINS.

(Court of Errors and Appeals of New Jersey, 1907. 67 Atl. 77, 11 L. R. A. [N. S.] 1007.)

SWAYZE, J. This is an action of replevin involving the title to certain engines, formerly the property of the Whitehead Machinery Company, an Iowa corporation. The plaintiffs claim under a sale made to them in Iowa on October 4, 1905, the defendants under an attachment out of the Hudson circuit levied at Jersey City October 7, 1905. The plaintiffs are residents of Iowa. The residence of the plaintiff in attachment is not shown, but seems to have been in Illinois, and the applying creditor is a resident of that state. The actual situs of the engines from the time they were bought by the Whitehead Machinery Company early in 1904 to the date of the attachment, more than a year and a half, was in Jersey City, where they were in the custody of the Pennsylvania Railroad. They had been bought by the Whitehead Company, which dealt in secondhand machinery, for

purpose of resale, and the evident intent was to leave them in Jersey City until they were actually sold. Notice of the sale to the plaintiffs was immediately given to the Pennsylvania Railroad Company. The sale was for the purpose of satisfying a note of the Whitehead Company dated November 1, 1904, payable one year after date and indorsed by the plaintiffs. This note was held by an Iowa bank, and was paid by the plaintiffs October 4, 1905, the day of the sale to them. One of the plaintiffs was a director of the Whitehead Company at the time, one had been but had resigned some time before, and two had acted as directors upon the supposition that five were required, but had discovered previous to October 4th that only three were authorized. All, however, took part in the transaction.

At the trial the solution of the question at issue was treated by counsel on both sides as dependent upon the law of Iowa as to transfers of property of an insolvent corporation to its directors, and evidence was taken on that subject by the plaintiffs and defendants. The trial judge directed a verdict for the plaintiffs, to which exception was duly taken. At the argument in this court it was for the first time suggested that the title was governed by the law of New Jersey, and counsel were allowed to submit supplemental briefs.

We think the case was tried by counsel upon an erroneous theory. The title to tangible personal property is ordinarily governed by the law of its situs. The maxim, "Mobilia personam sequuntur," states a mere fiction of law which it is sometimes necessary to apply in order to do justice, but it ought not to be extended beyond that necessity. Our Supreme Court long ago recognized the absurdity of affirming that goods found within the jurisdiction of the state are not subject to its laws (Varnum v. Camp, 13 N. J. Law, 326, 25 Am. Dec. 476), and more than 50 years later, in Cronan v. Fox, 50 N. J. Law, 417, 14 Atl. 119, this court said: "The rule that the title to movable property is to be judged of and determined by the lex rei sitæ (which is not without exceptions) has prominent application and adoption where personal property is seized under process issued from the courts of the state where the property is." The learned judge who wrote the opinion in that case did not state the exceptions to which he referred. He may have had in mind cases of choses in action, sometimes classed as movables and subject to the maxim above quoted (Moore v. Bonnell, 31 N. J. Law, 90); cases where both claimants have the same domicile (Runyon v. Groshon, 12 N. J. Eq. 86; Northwestern Bank v. Poynter, [1895] A. C. 56, 64 L. J. H. L. 27); cases where the conveyance is itself sufficient to pass title, and the only invalidity arises out of the proposed method of distributing the proceeds, and the objection is made by creditors not resident in New Jersey (Bentley v. Whittemore, 19 N. J. Eq. 462, 97 Am. Dec. 671); or cases where the goods are merely in transitu (Savigny on Private International Law [Eng. translation] 135, of which rule Knowles Loom Works v. Vacher, 57 N. J. Law, 490, 31 Atl. 306, 33 L.

R. A. 305, affirmed 59 N. J. Law, 586, 39 Atl. 1114, seems the nearest illustration in our Reports. We have recently reviewed the cases in Cooper v. Philadelphia Worsted Co.,[13] 68 N. J. Eq. 622, 60 Atl. 352. None of the exceptions are applicable to the present case. The cases of an assignment with preferences and of goods in transitu are most like it. The latter exception is not in point, since the goods were stored in Jersey City for more than a year and a half and without any present intent of removal, unless in the event of a resale. The former exception, which was the case of Bentley v. Whittemore, is not in point, since in that case the conveyance itself was sufficient under our law. It was only the method of distribution to which the conveyance was ancillary that militated with the provisions of our statute. It was therefore quite possible to sustain the conveyance in that case, and disregard the provision for a preference among creditors in the distribution. In the present case it is the conveyance itself which is voidable by creditors for reasons to be stated hereafter. The court took pains to point out in Bentley v. Whittemore the distinction between a defect in the conveyance itself and a defect in the scheme to which the conveyance was ancillary. Such a distinction was quite essential to the decision of that case, since the title to land came in question. The court said: "No doubt is intended to be hinted as to the settled existence of the rule that the validity of every disposition of real estate must depend upon the law of the country in which that estate is situated."

Cronan v. Fox was decided 20 years after Bentley v. Whittemore, and in our judgment enunciates the rule that must govern the present controversy. This case is, indeed, the converse of that. There the conveyance was invalid in Maryland, but valid in New Jersey. Here the conveyance is said to be valid in Iowa, but invalid in New Jersey. In that case we protected the grantee against the process of our own courts. If there is any difference, it is in favor of sustaining a seizure under the process of our courts, as we are now asked to do. One of the attaching creditors, and probably both, are not residents of Iowa, and hence are not to be held as bound by the law of that state. We therefore see no difficulty in the way of holding that the title to the goods is to be determined by the law of New Jersey.

The law of this state, independent of section 64 of the corporation act (P. L. 1896, p. 298), is that directors of an insolvent corporation are trustees of its funds for its creditors, and subject to the rule that a trustee cannot use property for his own benefit to the disadvantage of the cestui que trust. It follows that directors, who are creditors, stand upon the same footing as any other creditor, and cannot by any act of their own obtain a position superior to that of other creditors for whose benefit they hold the trust assets. This

[13] By mistake for Lees v. Harding, Whitman & Co.

wholesome doctrine was established at a time when our statute did not contain the provisions now embodied in section 64. Montgomery v. Phillips, 53 N. J. Eq. 203, 217, 31 Atl. 622. The rule applies only to directors. Savage v. Miller, 56 N. J. Eq. 432, 36 Atl. 578, 39 Atl. 665. The facts of this case suggest the query whether the same rule would be applicable to directors who are such only de facto; but it is not necessary to decide this question. One of the four to whom the engines were sold was actually a director. All seem to have taken part in the transaction and to have known of what our law deems a breach of trust. If so, they can no more profit thereby than the director himself.

A conveyance of property held in trust, by which a trustee attempts to secure an advantage for himself as against his cestui que trust, is voidable by the cestui que trust. Staats v. Bergen, 17 N. J. Eq. 554, 558; Romaine v. Hendrickson's Ex'rs, 27 N. J. Eq. 162, affirmed 28 N. J. Eq. 275; Bassett v. Shoemaker, 46 N. J. Eq. 538, 20 Atl. 52, 19 Am. St. Rep. 435. The question usually arises in equity, but there is no reason why the sale should not, like other fraudulent sales of personal property, be avoided at law. In this case the attaching creditors occupy the position of cestuis que trustent and the plaintiffs the position of trustees or vendees with notice. The attachment was in itself an election to avoid the sale. The rule of Montgomery v. Phillips applies only to insolvent corporations, and, unless there was evidence of insolvency on October 4, 1905, the direction of verdict for the plaintiffs was correct. We think there was persuasive evidence of insolvency within the meaning of the word in our law. National Bank of the Metropolis v. Sprague, 21 N. J. Eq. 530, 538; Skirm v. Eastern Rubber Mfg. Co., 57 N. J. Eq. 179, 184, 40 Atl. 769. It is unnecessary to recite the evidence which leads us to this view, since the question is one of fact, which must be determined by a jury.

The judgment must be reversed, and the record remitted for a new trial.[14]

[14] The actual situs determines also the jurisdiction of courts over proceedings in rem, and a judgment rendered by such a court will be recognized in every other jurisdiction. Castrique v. Imrie, L. R. 4 H. L. 414 (1870).

Tangible property can be attached only in the jurisdiction where it is actually situated. Bowen v. Pope, 125 Ill. 28, 17 N. E. 64, 8 Am. St. Rep. 330 (1888).

Tangible personal estate may be taxed in the jurisdiction where it is situated, irrespective of the nonresidence of its owner. Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613 (1891); Ayer & Lord Tie Co. v. Kentucky, 202 U. S. 409, 26 Sup. Ct. 679, 50 L. Ed. 1082 (1906). Provided, however, that such property has not merely a temporary situs within such state, but has been actually incorporated into the property of such state. Hays v. Pacific Mail S. S. Co., 17 How. 596, 15 L. Ed. 254 (1854); Old Dominion S. S. Co. v. Virginia, 198 U. S. 299, 25 Sup. Ct. 686, 49 L. Ed. 1059 (1905). If such property is situated permanently outside of the state in which its owner is domiciled, the state of the domicile has no power to tax the property. Union Refrigerator Transit Co. v. Kentucky, 199

Full faith + credit must be given to judgment rendered in the state; but not necessarily to actions in personam outside the state or the thing outside the state.

GREEN v. VAN BUSKIRK.

(Supreme Court of the United States, 1866, 1868. 5 Wall. 307, 18 L. Ed. 599; 7 Wall. 139, 19 L. Ed. 109.)

Motion to dismiss a writ of error to the Supreme Court of the state of New York.

The Constitution of the United States declares (section 1, art. 4) that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state; and that Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

Under the power here conferred, Congress, by Act May 26, 1790, c. 11, 1 Stat. 122, provides that records, authenticated in a way which it prescribes, shall "have such faith and credit given to them in every other court of the United States, as they have by law or usage in the court from which they are taken."

With this provision of the Constitution and this law in force, Bates being the owner of certain iron safes at Chicago, in the state of Illinois, on the 3d day of November, 1857, executed and delivered, in the state of New York, to Van Buskirk and others, a chattel mortgage of them. On the 5th day of the same month Green caused to be levied on the same safes a writ of attachment, sued by him out of the proper court in Illinois, against the property of Bates. The attachment suit proceeded to judgment, and the safes were sold in satisfaction of Green's debt. Van Buskirk, Green, and Bates, were all citizens of New York. Green's attachment was levied on the safes as the property of Bates, before the possession was delivered to Van Buskirk,

U. S. 194, 26 Sup. Ct. 36, 50 L. Ed. 150 (1905). Compare People of State of New York v. Miller, 202 U. S. 584, 26 Sup. Ct. 714, 50 L. Ed. 1155 (1906).

As to gifts causa mortis, see Emery v. Clough, 63 N. H. 552, 4 Atl. 796, 56 Am. St. Rep. 543 (1886).

CONTINENTAL LAW.—*Italy.*—"Personal property shall be governed by the national law of the owner, excepting dispositions to the contrary in the law of the country where it is situated." Article 7, Prel. Disp. Civ. Code. See, also, P. Esperson, 8 Clunet, 210–214.

In France and Germany the law of the situs is held to control. App. Douai, Dec. 11, 1891 (D. 1894, 2, 193), and note by Ch. de Boeck. To the effect that it governs even as between the parties, see R. G. Feb. 24, 1897 (8 Niemeyer, 46); O. L. G. Hamburg, May 18, 1894 (5 Niemeyer, 286). It determines, also, what constitutes delivery. 11 R. G. 52 (Feb. 15, 1884).

If the title has not passed under the lex rei sitæ, and the chattel is brought into a jurisdiction under whose law it would have passed, effect will be given to the original contract, provided the intent of the parties to transfer title has not changed in the meanwhile. O. L. G. Zwei-brücken, July 13, 1898 (10 Niemeyer, 220).

Gifts causa mortis are not recognized in France. Article 893, Civ. Code; Cass. May 14, 1900 (D. 1900, 1, 358). In Germany the rules relating to succession apply to them. If such gifts are actually executed in the lifetime of the donor, the provisions with respect to donations govern. Section 2301, Civ. Code.

and before the mortgage from Bates to him was recorded, and before notice of its existence.

Van Buskirk afterwards sued Green, in the New York courts, for the value of the safes thus sold under his attachment, and Green pleaded the proceeding in the court of Illinois in bar of the action. In this suit thus brought by him in the New York courts, Van Buskirk obtained judgment, and the judgment was affirmed in the highest court of the state of New York. From this affirmance Green took a writ of error to this court, assuming the case to fall within the twenty-fifth section of the judiciary act, which gives such writ in any case wherein is drawn in question a clause of the Constitution of the United States, and the decision is against the title, right, or privilege specially set up. His assumption was that the faith and credit which the judicial proceedings in the courts of the state of Illinois had by law and usage in that state, were denied to them by the decision of the courts of New York, and that in such denial, those courts decided against a right claimed by him under the above-mentioned section 1, art. 4, of the Constitution, and the act of Congress of May 26, 1790, on the subject of it.

MILLER, J.[15] The section of the Constitution discussed in this case declares that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And that Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

The act of 1790 was intended to be an exercise of the power conferred upon Congress by this section. In the leading case of Mills v. Duryee, 7 Cranch, 481, 3 L. Ed. 411, this court held that the act in question did declare the effect of such judicial records, and that it should be the same in other states as that in which the proceedings were had. In the case of Christmas v. Russell, 5 Wall. 290, 18 L. Ed. 475, decided at the present term of the court, we have reaffirmed this doctrine, and have further declared that no state can impair the effect thus to be given to judicial proceedings in her sister state, by a statute of limitation intended to operate on demands which may have passed into judgment by such proceedings, as though no such judgment had been rendered.

The record before us contains the pleadings in the case, the facts found by the court, and the conclusions of law arising thereon. And notwithstanding the inverted manner in which the court has stated its legal conclusions, it seems clear that it did pass upon the effect of the judicial proceedings in Illinois upon the title of the property in contest. The case is not varied by declaring that the mortgage made and delivered in New York overreached the subsequent attachment

[15] The dissenting opinion of Nelson, J., with whom concurred Swayne, J., has been omitted.

in Illinois. According to the view taken by that court, Van Buskirk, the plaintiff, had title to the property under the laws of New York by virtue of his mortgage, and the question to be decided was whether the proceedings in Illinois were paramount in their effect upon the title to the New York mortgage.

It is said that Van Buskirk being no party to the proceedings in Illinois was not bound by them, but was at liberty to assert his claim to the property in any forum that might be open to him; and, strictly speaking, this is true. He was not bound by way of estoppel, as he would have been if he had appeared and submitted his claim, and contested the proceedings in attachment. He has a right to set up any title to the property which is superior to that conferred by the attachment proceedings, and he has the further right to show that the property was not liable to the attachment—a right from which he would have been barred if he had been a party to that suit. And this question of the liability of the property in controversy to that attachment is the question which was raised by the suit in New York, and which was there decided. That court said that this question must be decided by the laws of the state of New York, because that was the domicile of the owner at the time the conflicting claims to the property originated.

We are of opinion that the question is to be decided by the effect given by the laws of Illinois, where the property was situated, to the proceedings in the courts of that state, under which it was sold.

There is no little conflict of authority on the general question as to how far the transfer of personal property by assignment or sale, made in the country of the domicile of the owner, will be held to be valid in the courts of the country where the property is situated, when these are in different sovereignties. The learned author of the Commentaries on the Conflict of Laws, has discussed the subject with his usual exhaustive research. And it may be conceded that as a question of comity, the weight of his authority is in favor of the proposition that such transfers will generally be respected by the courts of the country where the property is located, although the mode of transfer may be different from that prescribed by the local law. The courts of Vermont and Louisiana, which have given this question the fullest consideration, have, however, either decided adversely to this doctrine or essentially modified it. Taylor v. Boardman, 25 Vt. 589; Ward v. Morrison, 25 Vt. 593; Emerson v. Partridge, 27 Vt. 8, 62 Am. Dec. 617; Olivier v. Townes, 2 Mart. (N. S.) 93; Norris v. Mumford, 4 Mart. (N. S.) 20. Such also seems to have been the view of the Supreme Court of Massachusetts. Lanfear v. Sumner, 17 Mass. 110, 9 Am. Dec. 119.

But after all, this is a mere principle of comity between the courts, which must give way when the statutes of the country where property is situated, or the established policy of its laws prescribe to its courts a different rule. The learned commentator, already referred to, in speaking of the law in Louisiana which gives paramount title

to an attaching creditor over a transfer made in another state, which is the domicile of the owner of the property, says: "No one can seriously doubt that it is competent for any state to adopt such a rule in its own legislation, since it has perfect jurisdiction over all property, personal as well as real, within its territorial limits. Nor can such a rule, made for the benefit of innocent purchasers and creditors, be deemed justly open to the reproach of being founded in a narrow or a selfish policy." Story on the Conflict of Laws, § 390. Again, he says: "Every nation, having a right to dispose of all the property actually situated within it, has (as has been often said) a right to protect itself and its citizens against the inequalities of foreign laws, which are injurious to their interests."

Chancellor Kent, in commenting on a kindred subject, namely, the law of contracts, remarks (2 Commentaries, 599): "But, on this subject of conflicting laws, it may be generally observed that there is a stubborn principle of jurisprudence that will often intervene and act with controlling efficacy. This principle is, that where the lex loci contractus and the lex fori, as to conflicting rights acquired in each, come in direct collision, the comity of nations must yield to the positive law of the land."

In the case of Milne v. Moreton, 6 Bin. (Pa.) 353, 6 Am. Dec. 466, the Supreme Court of Pennsylvania says, that "every country has a right of regulating the transfer of all personal property within its territory; but when no positive regulation exists, the owner transfers it at his pleasure."

The Louisiana court, in a leading case on this subject, gives, in the following language, a clear statement of the foundation of this principle: "The municipal laws of a country have no force beyond its territorial limits, and when another government permits these to be carried into effect within her jurisdiction, she does so upon a principle of comity. In doing so, care must be taken that no injury is inflicted on her own citizens, otherwise justice would be sacrificed to comity. * * * If a person sends his property within a jurisdiction different from that where he resides, he impliedly submits it to the rules and regulations in force in the country where he places it."

Apart from the question of authority, let us look at some of the consequences of the doctrine held by the court of New York.

If the judgment rendered against the plaintiff in error is well founded, then the sheriff who served the writ of attachment, the one who sold the property on execution, any person holding it in custody pending the attachment proceeding, the purchaser at the sale, and all who have since exercised control over it, are equally liable.

If the judgment in the state of Illinois, while it protects all such persons against a suit in that state, is no protection anywhere else, it follows that in every case where personal property has been seized under attachment, or execution against a nonresident debtor, the officer whose duty it was to seize it, and any other person having any of the

relations above described to the proceeding, may be sued in any other state, and subjected to heavy damages by reason of secret transfers of which they could know nothing, and which were of no force in the jurisdiction where the proceedings were had, and where the property was located.

Another consequence is that the debtor of a nonresident may be sued by garnishee process, or by foreign attachment as it is sometimes called, and be compelled to pay the debt to some one having a demand against his creditors; but if he can be caught in some other state, he may be made to pay the debt again to some person who had an assignment of it, of which he was ignorant when he was attached.

The article of the Constitution, and the act of Congress relied on by the plaintiff in error, if not expressly designed for such cases as these, find in them occasions for their most beneficent operation.

We do not here decide that the proceedings in the state of Illinois have there the effect which plaintiff claims for them; because that must remain to be decided after argument on the merits of the case. But we hold that the effect which these proceedings have there, by the law and usage of that state, was a question necessarily decided by the New York courts, and that it was decided against the claim set up by plaintiff in error under the constitutional provision and statute referred to, and that the case is therefore properly here for review.

Motion to dismiss overruled.

DAVIS, J. That the controversy in this case was substantially ended when this court refused (5 Wall. 312, 18 L. Ed. 599) to dismiss the writ of error for want of jurisdiction, is quite manifest by the effort which the learned counsel for the defendants in error now make, to escape the force of that decision.

The question raised on the motion to dismiss was, whether the Supreme Court of New York, in this case, had decided against a right which Green claimed under the Constitution, and an act of Congress. If it had, then this court had jurisdiction to entertain the writ of error, otherwise not.

It was insisted on the one side, and denied on the other, that the faith and credit which the judicial proceedings in the courts of the state of Illinois had by law and usage in that state, were denied to them by the Supreme Court of New York, in the decision which was rendered.

Whether this was so or not, could only be properly considered when the case came to be heard on its merits; but this court, in denial of the motion to dismiss, held that the Supreme Court of New York necessarily decided what effect the attachment proceedings in Illinois had by the law and usage in that state; and as it decided against the effect which Green claimed for them, this court had jurisdiction, under the clause of the Constitution which declares "that full faith and credit shall be given in each state to the public acts, records, and ju-

dicial proceedings in every other state," and the act of Congress of 1790, which gives to those proceedings the same faith and credit in other states, that they have in the state in which they were rendered.

This decision, supported as it was by reason and authority, left for consideration, on the hearing of the case, the inquiry, whether the Supreme Court of New York did give to the attachment proceedings in Illinois, the same effect they would have received in the courts of that state.

By the statutes of Illinois, any creditor can sue out a writ of attachment against a nonresident debtor, under which the officer is required to seize and take possession of the debtor's property, and if the debtor cannot be served with process, he is notified by publication, and if he does not appear, the creditor, on making proper proof, is entitled to a judgment by default for his claim, and a special execution is issued to sell the property attached. The judgment is not a lien upon any other property than that attached; nor can any other be taken in execution to satisfy it. These statutes further provide, that mortgages on personal property have no validity against the rights and interests of third persons, without being acknowledged and recorded, unless the property be delivered to and remain with the mortgagee.

And so strict have the courts of Illinois been in construing the statute concerning chattel mortgages, that they have held, if the mortgage cannot be acknowledged in the manner required by the act, there is no way of making it effective, except to deliver the property, and that even actual notice of the mortgage to the creditor, if it is not properly recorded, will not prevent him from attaching and holding the property. Henderson v. Morgan, 26 Ill. 431; Porter v. Dement, 35 Ill. 479.

The policy of the law in Illinois will not permit the owner of personal property to sell it and still continue in possession of it. If between the parties, without delivery, the sale is valid, it has no effect on third persons who, in good faith, get a lien on it; for an attaching creditor stands in the light of a purchaser, and as such will be protected. Thornton v. Davenport, 1 Scam. (Ill.) 296, 29 Am. Dec. 358; Jones' Estate v. Jones, 16 Ill. 117. But it is unnecessary to cite any other judicial decisions of that state but the cases of Martin v. Dryden, 1 Gilman (Ill.) 187, and Burnell v. Robertson, 5 Gilman (Ill.) 282, which are admitted in the record to be a true exposition of the laws of Illinois on the subject, to establish that there the safes were subject to the process of attachment, and that the proceedings in attachment took precedence of the prior unrecorded mortgage from Bates.

If Green, at the date of the levy of his attachment, did not know of this mortgage, and subsequently perfected his attachment by judgment, execution, and sale, the attachment held the property, although at the date of the levy of the execution he did know of it. The lien he acquired, as a bona fide creditor, when he levied his attachment without notice of the mortgage, he had the right to perfect and secure to himself, notwithstanding the fact that the mortgage existed,

was known to him, before the judicial proceedings were completed. This doctrine has received the sanction of the highest court in Illinois through a long series of decisions, and may well be considered the settled policy of the state on the subject of the transfer of personal property. If so, the effect which the courts there would give to these proceedings in attachment, is too plain for controversy. It is clear, if Van Buskirk had selected Illinois, instead of New York, to test the liability of these safes to seizure and condemnation, on the same evidence and pleadings, their seizure and condemnation would have been justified.

It is true, the court in Illinois did not undertake to settle in the attachment suit the title to the property, for that question was not involved in it, but when the true state of the property was shown by other evidence, as was done in this suit, then it was obvious that by the laws of Illinois it could be seized in attachment as Bates' property.

In order to give due force and effect to a judicial proceeding, it is often necessary to show by evidence, outside of the record, the predicament of the property on which it operated. This was done in this case, and determined the effect the attachment proceedings in Illinois produced on the safes, which effect was denied to them by the Supreme Court of New York.

At an early day in the history of this court, the act of Congress of 1790, which was passed in execution of an express power conferred by the Constitution, received an interpretation which has never been departed from (Mills v. Duryee, 7 Cranch, 481, 3 L. Ed. 411), and obtained its latest exposition in the case of Christmas v. Russell, 5 Wall. 290, 18 L. Ed. 475.

The act declares that the record of a judgment (authenticated in a particular manner), shall have the same faith and credit as it has in the state court from whence it is taken. And this court say: "Congress have therefore declared the effect of the record, by declaring what faith and credit shall be given to it;" and that "it is only necessary to inquire in every case what is the effect of a judgment in the state where it is rendered."

It should be borne in mind in the discussion of this case, that the record in the attachment suit was not used as the foundation of an action, but for purposes of defence. Of course Green could not sue Bates on it, because the court had no jurisdiction of his person; nor could it operate on any other property belonging to Bates than that which was attached. But, as by the law of Illinois, Bates was the owner of the iron safes when the writ of attachment was levied, and as Green could and did lawfully attach them to satisfy his debt in a court which had jurisdiction to render the judgment, and as the safes were lawfully sold to satisfy that judgment, it follows that when thus sold the right of property in them was changed, and the title to them became vested in the purchasers at the sale. And as the effect of the levy, judgment and sale is to protect Green if sued in the courts

of Illinois, and these proceedings are produced for his own justification, it ought to require no argument to show that when sued in the court of another state for the same transaction, and he justifies in the same manner, that he is also protected. Any other rule would destroy all safety in derivative titles, and deny to a state the power to regulate the transfer of personal property within its limits and to subject such property to legal proceedings.

Attachment laws, to use the words of Chancellor Kent, "are legal modes of acquiring title to property by operation of law." They exist in every state for the furtherance of justice, with more or less of liberality to creditors. And if the title acquired under the attachment laws of a state, and which is valid there, is not to be held valid in every other state, it were better that those laws were abolished, for they would prove to be but a snare and a delusion to the creditor.

The Vice Chancellor of New York, in Cochran v. Fitch, 1 Sandf. Ch. (N. Y.) 146, when discussing the effect of certain attachment proceedings in the state of Connecticut, says: "As there was no fraud shown, and the court in Connecticut had undoubted jurisdiction in rem against the complainant, it follows that I am bound in this state to give to the proceedings of that court the same faith and credit they would have in Connecticut." As some of the judges of New York had spoken of these proceedings in another state, without service of process or appearance, as being nullities in that state and void, the same Vice Chancellor says: "But these expressions are all to be referred to the cases then under consideration, and it will be found that all those were suits brought upon the foreign judgment as a debt, to enforce it against the person of the debtor, in which it was attempted to set up the judgment as one binding on the person."

The distinction between the effect of proceedings by foreign attachments, when offered in evidence as the ground of recovery against the person of the debtor, and their effect when used in defence to justify the conduct of the attaching creditor, is manifest and supported by authority. Cochran v. Fitch, 1 Sandf. Ch. (N. Y.) 146; Kane v. Cook, 8 Cal. 449. Chief Justice Parker, in Hall v. Williams, 6 Pick. (Mass.) 232, 17 Am. Dec. 356, speaking of the force and effect of judgments recovered in other states, says: "Such a judgment is to conclude as to everything over which the court which rendered it had jurisdiction. If the property of the citizen of another state, within its lawful jurisdiction, is condemned by lawful process there, the decree is final and conclusive."

It would seem to be unnecessary to continue this investigation further, but our great respect for the learned court that pronounced the judgment in this case, induces us to notice the ground on which they rested their decision. It is, that the law of the state of New York is to govern this transaction, and not the law of the state of Illinois where the property was situated; and as, by the law of New York, Bates had no property in the safes at the date of the levy of the writ of

attachment, therefore none could be acquired by the attachment. The theory of the case is, that the voluntary transfer of personal property is to be governed everywhere by the law of the owner's domicile, and this theory proceeds on the fiction of law that the domicile of the owner draws to it the personal estate which he owns wherever it may happen to be located. But this fiction is by no means of universal application, and as Judge Story says, "yields whenever it is necessary for the purposes of justice that the actual situs of the thing should be examined." It has yielded in New York on the power of the state to tax the personal property of one of her citizens, situated in a sister state (People v. Commissioner of Taxes, 23 N. Y. 225) and always yields to "laws for attaching the estate of nonresidents, because such laws necessarily assume that property has a situs entirely distinct from the owner's domicile." If New York cannot compel the personal property of Bates (one of her citizens) in Chicago to contribute to the expenses of her government, and if Bates had the legal right to own such property there, and was protected in its ownership by the laws of the state; and as the power to protect implies the right to regulate, it would seem to follow that the dominion of Illinois over the property was complete, and her right perfect to regulate its transfer and subject it to process and execution in her own way and by her own laws.

We do not propose to discuss the question how far the transfer of personal property lawful in the owner's domicile will be respected in the courts of the country where the property is located and a different rule of transfer prevails. It is a vexed question, on which learned courts have differed; but after all there is no absolute right to have such transfer respected, and it is only on a principle of comity that it is ever allowed. And this principle of comity always yields when the laws and policy of the state where the property is located has prescribed a different rule of transfer with that of the state where the owner lives.

We have been referred to the case of Guillander v. Howell, 35 N. Y. 657, recently decided by the Court of Appeals of New York, and as we understand the decision in that case, it harmonizes with the views presented in this opinion. A citizen of New York owning personal property in New Jersey made an assignment, with preferences to creditors, which was valid in New York but void in New Jersey. Certain creditors in New Jersey seized the property there under her foreign attachment laws and sold it, and the Court of Appeals recognized the validity of the attachment proceeding, and disregarded the sale in New York. That case and the one at bar are alike in all respects except that the attaching creditor there was a citizen of the state in which he applied for the benefit of the attachment laws, while Green, the plaintiff in error, was a citizen of New York; and it is insisted that this point of difference is a material element to be considered by the court in determining this controversy, for the reason that the parties to this suit, as citizens of New York,

were bound by its laws. But the right under the Constitution of the United States and the law of Congress which Green invoked to his aid is not at all affected by the question of citizenship. We cannot see why, if Illinois, in the spirit of enlightened legislation, concedes to the citizens of other states equal privileges with her own in her foreign attachment laws, that the judgment against the personal estate located in her limits of a nonresident debtor, which a citizen of New York lawfully obtained there, should have a different effect given to it under the provisions of the Constitution and the law of Congress, because the debtor, against whose property it was recovered, happened also to be a citizen of New York.

The judgment of the Supreme Court of the state of New York is reversed, and the cause remitted to that court with instructions to enter judgment for the plaintiff in error.

SHAPARD v. HYNES.

(Circuit Court of Appeals, Eighth Circuit, 1900. 104 Fed. 449, 45 C. C. A. 271, 52 L. R. A. 675.)

In error to the United States Court of Appeals in the Indian Territory.

This was a suit for the wrongful seizure and conversion under a writ of attachment of a marble soda fountain and the general outfit of a confectionery establishment which had been moved from Texas to the Indian Territory about 18 months before the seizure. The writ of attachment was levied at the instance of the defendants, the Shapard Grocery Company, a copartnership, to which J. E. Cottraux, against whom the writ was directed, was indebted. Plaintiffs claimed title to the chattels under a bill of sale executed by Cottraux's parents in Texas, where it was recorded. J. E. Cottraux claimed to have the chattels in his possession as lessee of the plaintiffs. The Shapard Grocery Company contended that the bill of sale was in reality a mortgage, and that plaintiffs, if mortgagees, could not follow the property into the Indian Territory. The trial resulted in a judgment for plaintiffs which was affirmed by the Court of Appeals in the Indian Territory.[16]

THAYER, Circuit Judge.[17] * * * There has been much discussion concerning the effect of the removal of mortgaged goods and chattels from the state where the mortgage was made and recorded, to another state. The general consensus of judicial opinion seems to be that when personal property, which at the time is situated in a given state, is there mortgaged by the owner, and the mortgage is

[16] The statement of facts has been abridged.
[17] A part of the opinion has been omitted.

duly executed and recorded in the mode required by the local law, so as to create a valid lien, the lien remains good and effectual, although the property is removed to another state, either with or without the consent of the mortgagee, and although the mortgage is not re-recorded in the state to which the removal is made. The mortgage lien is given effect, however, in the state to which the property is removed, solely by virtue of the doctrine of comity. Hence a state may by appropriate legislation decline to observe the rule of comity, and may require all mortgages affecting personal property which is situated therein or brought therein to be there recorded, as a condition precedent to the recognition of their validity in that state. But the statutes of a state which prescribe how mortgages on personal property shall be executed and recorded are generally, if not universally, regarded as speaking with respect to mortgages made within the state upon property there situated, and as having no reference to personalty brought within the state which is at the time incumbered with a valid lien created elsewhere. These propositions are fully sustained by the following authorities: Hornthal v. Burwell, 109 N. C. 10, 13 S. E. 721, 13 L. R. A. 740, 26 Am. St. Rep. 556; Smith v. McLean, 24 Iowa, 322, 328, 329; Handley v. Harris, 48 Kan. 606, 29 Pac. 1145, 17 L. R. A. 703, 30 Am. St. Rep. 322; Bank of Commerce v. Morris, 114 Mo. 255, 21 S. W. 511, 19 L. R. A. 463; Kanaga v. Taylor, 7 Ohio St. 134, 70 Am. Dec. 62; Langworthy v. Little, 12 Cush. (Mass.) 109; Whitney v. Heywood, 6 Cush. (Mass.) 82; Ames Iron Works v. Warren, 76 Ind. 512, 40 Am. Rep. 258; Feurt v. Rowell, 62 Mo. 524, 526; Cool v. Roche, 20 Neb. 550, 556, 31 N. W. 367; Keenan v. Stimson, 32 Minn. 377, 20 N. W. 364; Offutt v. Flagg, 10 N. H. 46; Lathe v. Schoff, 60 N. H. 34; Barrows v. Turner, 50 Me. 127; Hall v. Pillow, 31 Ark. 32; Mumford v. Canty, 50 Ill. 370, 99 Am. Dec. 525; Ballard v. Winter, 12 Am. Law Reg. (N. S.) 759; Jones, Chat. Mortg., (4th Ed.) § 260. So far as our research has extended, Michigan is the only state which declines to recognize the validity of a mortgage lien upon personal property brought within its borders that was created elsewhere, and which maintains the superiority of an attachment lien acquired in a suit commenced in that state against the mortgagor, who has the property in his possession. Corbett v. Littlefield, 84 Mich. 30, 47 N. W. 581, 11 L. R. A. 95, 22 Am. St. Rep. 681; Boydson v. Goodrich, 49 Mich. 66, 12 N. W. 913.[18] The decision in Green v. Van Buskirk, 7 Wall. 139, 150, 19 L. Ed. 109, is not in conflict with the doctrines stated above, since the mortgaged property that was involved in that case was located in Illinois at the date of the mortgage, which was executed in New York, and the court was unable to give to the legal fiction that the domicile of the owner draws to it all of his personal property such force and effect as to remove the

[18] See, also, Snyder v. Yates, 112 Tenn. 309, 79 S. W. 796, 64 L. R. A. 353, 105 Am. St. Rep. 941 (1904).

property in controversy from the operation of the laws of the state of Illinois, and subject it to the operation of the laws of New York. Sections 4742 and 4743 of Mansfield's Digest of the Laws of Arkansas (sections 3053, 3054, Ind. T. Ann. St. 1899), relative to the execution and recording of mortgages, which were in force in the Indian Territory until modified, as to the place where mortgages of personal property shall be recorded, by the act of congress approved February 3, 1897 (29 Stat. 510, c. 136), have reference only to mortgages made in that territory upon property there located (Bank of United States v. Lee, 13 Pet. 107, 120, 10 L. Ed. 81); and, within the doctrine above stated, they cannot be given effect to destroy the lien of the instrument under which the plaintiffs claim title to the property in controversy, that was executed and recorded in Texas, where the property was at the time located, and where both the mortgagors and the mortgagees at that time resided. Even if that instrument was intended as a mortgage, and not as an absolute bill of sale, the lien thereby created followed the property into the Indian Territory, and was rightly given effect by comity, and should have been given effect even if the attaching creditors did not have actual notice of the existence and record of the instrument at the date of the levy, since no effort was made in the trial court to impeach the instrument for fraud, or to question the consideration upon which it was founded.[19] * * *

EDGERLY v. BUSH.

(Court of Appeals of New York, 1880. 81 N. Y. 190.)

Appeal from order of General Term of the Supreme Court, in the Third Judicial Department, reversing a judgment in favor of plaintiff, entered upon the report of a referee. (Reported below, 16 Hun, 80.)

This action was brought for the alleged conversion of a span of horses.

The facts, as found by the referee, are as follows:

One Stephen Baker was born in Lower Canada and resided there till 1873. In that year he went to Moriah, in New York, engaged there in business and resided there. While a resident of Moriah he executed to the plaintiff, a resident also of Moriah, on the 9th day of March, 1875, a chattel mortgage on property including the span of horses in question. This mortgage was duly filed March 10, 1875. The sum was payable in monthly installments, the first payment to be made June 1, 1875. The mortgage contained a clause that in case of nonpayment, or in case the mortgagor or any other person should remove,

[19] As to effect of consent of mortgagee to the removal, see Jones v. North Pac. Fish & Oil Co., 42 Wash. 332, 84 Pac. 1122, 6 L. R. A. (N. S.) 940, 114 Am. St. Rep. 131 (1906).

secrete or dispose of the property, or if the mortgagee deemed it necessary, he might take possession, otherwise the property was to remain in the mortgagor's possession until the time for the first payment. No part of the sum secured has ever been paid. On the 10th of May, 1875, Baker returned to Lower Canada, taking the property with him, and there he has resided ever since. In November, 1875, at St. Jean Chrysostom, in Lower Canada, one Francis De Lisle, of that place, a regular trader, dealing in horses, sold the horses in question to one Bromley, a resident of Plattsburgh in this state. Bromley made the purchase in good faith and in ignorance of the plaintiff's claim. The horses were in De Lisle's possession at the time and were at once delivered to Bromley and immediately brought by him to Plattsburgh. It does not appear how the horses came into the possession of De Lisle. On the 10th of December, 1875, Bromley learned that the plaintiff claimed to have a mortgage on the horses. To prevent their seizure, by the plaintiff, he immediately removed them to Canada for the purpose of trading back with De Lisle. On the 13th of December, 1875, in Canada, Bromley sold the horses to the defendant. At that time the defendant was a resident of this state. The horses in question remained in Canada, and since then they had not been brought into this state up to the time when this action was commenced. The defendant was informed by Bromley that he had run the horses into Canada to avoid a claim or seizure under a mortgage. Plaintiff made a demand for the horses but defendant refused to deliver. Plaintiff did not reimburse, or offer to reimburse to defendant, the amount paid by him or by Bromley for the horses. Under the laws of Lower Canada, if an article of personal property, lost or stolen, be sold in a fair or market, or at a public sale, or purchased from a trader dealing in similar articles, the owner cannot reclaim it without reimbursing to the purchaser the price paid by him.

FOLGER, C. J. This is an action for the conversion of chattels. It is clear that if the plaintiff had the title to them, or the right to take immediate possession of them, the defendant exerted such dominion over them as was in law a conversion of them. It is also clear that the plaintiff had the title to the property by the laws of this state, and the right to the immediate possession of it.

The defendant must make his defense, if he may at all, upon a title got by Bromley from De Lisle, to which he has succeeded. De Lisle was a resident of Canada, and a trader dealing in articles like the property in contest, and had actual possession of this property there as the proprietor of it. Bromley bought it of him in good faith, gave value for it, and had not actual notice of the plaintiff's right to it. The plaintiff has never reimbursed to Bromley or to the defendant the price paid for it by Bromley, nor has he offered so to do.

We think that these facts make a title in Bromley that the law of Lower Canada would uphold in that jurisdiction. We deem it unnecessary to go into the detail of the interpretation. The question re-

maining is, which law is to prevail in determining this contest—that of Lower Canada, or that of this state?

We take note that the plaintiff, and Baker from whom the plaintiff got title, were residents of this state when the transfer was made between them; that it was a transfer of property which was then here, whence it was taken without the consent of the plaintiff; that the transfer was made by mutual consent, and was executed and valid here; that the consideration for the transfer existed and passed here; that the plaintiff and defendant were and are residents of this state; and that the forum in which they stand is here. Thus the law of the domicile, and the law of the then situs of the property, and the law of the forum in which the remedy is sought, all concur to sustain the right of the plaintiff. The law of the domicile of the owner of personal property, as a general rule, determines the validity of every transfer made of it by him. By that law, as it exists in this case, the plaintiff became the owner of this property before it was taken beyond its operation. By that law too, an owner of property may not be divested of it without his consent, or by due process of law; plainly not by a dealing with it by others without his knowledge, assent, or procurement. Still, another state may make provision by statute in respect to personal property actually within its jurisdiction. Though a transfer of personal property, valid by the law of the domicile, is valid everywhere as a general principle, there is to be excepted that territory in which it is situated and where a different law has been set up, when it is necessary for the purpose of justice that the actual situs of the thing be examined. Green v. Van Buskirk, 7 Wall. (U. S.) 139, 19 L. Ed. 109. Yet the statutes of that land have no extra-territorial force proprio vigore, though often permitted by comity to operate in another state for the promotion of justice, where neither the state nor its citizens will suffer any inconvenience from the application of them. The exercise of comity in admitting or restraining the application of the laws of another country must rest in sound judicial discretion, dictated by the circumstances of the case. Per Parker, C. J., Blanchard v. Russell, 13 Mass. 6, 7 Am. Dec. 106. It is plain that on no principle applicable to this case could the sale of the plaintiff's property by another having no authority from him, to his wrong indeed, be upheld, save that it was authorized by the statute of Lower Canada. So that the question is one entirely of the comity to be shown by the courts of this state to the enactments of another country. Those statutes not only enact the rule of market-overt as it prevails in general in England, but carry it further, and make, as in the city of London, every sale by a trader dealing in like articles as good as a sale at market-overt.

That rule does not obtain in this state. It has not been our policy to establish it. Our policy has been, and is, to protect the right of ownership, and to leave the buyer to take care that he gets a good title. It would be to the contravention of that policy, and to the inconvenience of our citizens, if we should give effect to these statutes of

Lower Canada, to the divesting of titles to movables lawfully acquired and held by our general and statute law, without the assent or intervention, and against the will of the owner by our law. Notions of property are slight, when a bona fide purchase of stolen goods gives a good title against the original owner. Per Kent, C. J., Wheelwright v. Depeyster, 1 Johns. 470, 3 Am. Dec. 345. We are not required to show comity to that extent; especially as it is to our citizens alone that we are administering justice.

There are judgments to the end that the law of the situs of the movable property will determine who is entitled to it, and the matter of comity is not taken into account. A notable one is Cammell v. Sewell (In the Exchequer Chamber) 5 H. & N. 728. But there the property had not been in England until after the sale in Norway, and had never been in the possession of the English owners. We doubt whether, in a case like this, where, after a title to property has been acquired by the law of the domicile of the vendor, and of the situs of the thing, and of the forum in which the parties stand in a contest between citizens of the state of that forum, it has ever been adjudged that such title has been divested by the surreptitious removal of the thing into another state, and a sale of it there under different laws. There are decisions that it has not, however. See Taylor v. Boardman, 25 Vt. 581; Martin v. Hill, 12 Barb. 631; French v. Hall, 9 N. H. 137, 32 Am. Dec. 341; Langworthy v. Little, 12 Cush. (Mass.) 109. It is sought to distinguish these cases from that in hand; but they went upon a principle that is not inapplicable here. In them, as here, a right to movable property had been acquired in one state in a mode efficient thereto by its laws. The property had been taken into another state where that mode was not sufficient by its law to create a right. But the right acquired by that mode was upheld, in all the cases the property was taken away from under the laws which gave the right, and placed under the operation of laws that denied the right. We perceive no difference in those cases from this that we have, save that in those a creditor was seeking to recover his debt out of the property, in invitum the right thus acquired. Here there is a sale of the property between third parties despite the right. In those it was sought to take away the right by a public judicial sale. In this it is urged that the right has been destroyed by a private sale. By the laws of those other states the creditors would have succeeded. So here the third parties would succeed by the law of Lower Canada. But in those cases the law of the state where the right was acquired was recognized, and force given to it in another state and under different law. Why should it not be in this case?

Such cases as Grant v. McLachlin, 4 Johns. (N. Y.) 34, and The Helena, 4 Rob. Adm. 3, do not conflict. In them there were in the foreign country legal proceedings in rem, or analogous thereto, so that the question was of respect for the judicial proceedings of another country. The case of Greenwood v. Curtis, 6 Mass. 358, 4 Am. Dec. 145,

recognized the principles upon which our judgment proceeds, but held that the facts did not call for the application of them.

The order of the General Term should be reversed, and judgment on report of the referee be affirmed.

Order reversed and judgment affirmed.[20]

HERVEY v. RHODE ISLAND LOCOMOTIVE WORKS.

(Supreme Court of the United States, 1876. 93 U. S. 664, 23 L. Ed. 1003.)

Error to the Circuit Court of the United States for the Southern District of Illinois.

The Rhode Island Locomotive Works sold to J. Edwin Conant & Co. a locomotive, title to remain in the vendor until the payment of the purchase price. The agreement of sale was executed by the Rhode Island Locomotive Works at its place of business in Rhode Island and by Conant & Co. in New York, where they resided. The locomotive was delivered to Conant & Co. to be used by them in Illinois, and was so removed to and used by them in that state. Before the agreement was recorded the locomotive was seized as the property of Conant & Co. and sold to Hervey. The Rhode Island Locomotive Works sued out a writ of replevin in the Circuit Court of the United States for the Southern District of Illinois. Judgment was given for the plaintiff.[21]

DAVIS, J. It was decided by this court, in Green v. Van Buskirk, 5 Wall. 307, 18 L. Ed. 599; Id., 7 Wall. 139, 19 L. Ed. 109, that the liability of property to be sold under legal process, issuing from the courts of the state where it is situated, must be determined by the law there, rather than that of the jurisdiction where the owner lives. These decisions rest on the ground that every state has the right to regulate the transfer of property within its limits, and that whoever sends property to it impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where he resides. He has no absolute right to have the transfer of property, lawful in that jurisdiction, respected in the courts of the state where it is found, and it is only on a principle of comity that it is ever allowed. But this principle yields when the laws and policy of the latter state conflict with those of the former.

The policy of the law in Illinois will not permit the owner of personal property to sell it, either absolutely or conditionally, and still con-

[20] As to chattel mortgages in general see Marion Griffin, the Effect of Foreign Chattel Mortgages upon the Rights of Subsequent Purchasers and Creditors, 4 Mich. Law Rev. 358–370; also 70 Am. Dec. 67–72; 64 L. R. A. 353–366.

[21] This statement of facts has been substituted for that of the original report.

tinue in possession of it. Possession is one of the strongest evidences of title to this class of property, and cannot be rightfully separated from the title, except in the manner pointed out by statute. The courts of Illinois say that to suffer without notice to the world the real ownership to be in one person, and the ostensible ownership in another, gives a false credit to the latter, and in this way works an injury to third persons. Accordingly, the actual owner of personal property creating an interest in another, to whom it is delivered, if desirous of preserving a lien on it, must comply with the provisions of the chattel mortgage act. Rev. St. Ill. 1874, pp. 711, 712, c. 95. It requires that the instrument of conveyance, if it have the effect to preserve a mortgage or lien on the property, must be recorded, whether the party to it be a resident or nonresident of the state. If this be not done, the instrument, so far as third persons are concerned, has no validity.

Secret liens which treat the vendor of personal property, who has delivered possession of it to the purchaser, as the owner until the payment of the purchase-money, cannot be maintained in Illinois. They are held to be constructively fraudulent as to creditors, and the property, so far as their rights are concerned, is considered as belonging to the purchaser holding the possession. McCormick v. Hadden, 37 Ill. 370; Ketchum v. Watson, 24 Ill. 591. Nor is the transaction changed by the agreement assuming the form of a lease. In determining the real character of a contract, courts will always look to its purpose, rather than to the name given to it by the parties. If that purpose be to give the vendor a lien on the property until payment in full of the purchase money, it is liable to be defeated by creditors of the purchaser who is in possession of it. This was held in Murch v. Wright, 46 Ill. 488, 95 Am. Dec. 455. In that case the purchaser took from the seller a piano at the price of $700. He paid $50 down, which was called rent for the first month, and agreed to pay, as rent, $50 each month until the whole amount should be paid, when he was to own the piano. The court held, "that it was a mere subterfuge to call this transaction a lease," and that it was a conditional sale, with the right of rescission on the part of the vendor, in case the purchaser should fail in payment of his installments—a contract legal and valid as between the parties, but subjecting the vendor to lose his lien in case the property, while in possession of the purchaser, should be levied upon by his creditors. That case and the one at bar are alike in all essential particulars.

The engine Smyser, the only subject of controversy in this suit, was sold on condition that each and all of the installments should be regularly paid, with a right of rescission on the part of the vendor in case of default in any of the specified payments.

It is true the instrument of conveyance purports to be a lease, and the sums stipulated to be paid are for rent; but this form was used to cover the real transaction, as much so as was the rent of the piano in

Murch v. Wright, supra. There the price of the piano was to be paid in thirteen months, and here, that of the engine, $12,093.96, in one year. It was evidently not the intention that this large sum should be paid as rent for the mere use of the engine for one year. If so, why agree to sell and convey the full title on the payment of the last installment? In both cases, the stipulated price of the property was to be paid in short installments, and no words employed by the parties can have the effect of changing the true nature of the contracts. In the case at bar the agreement contemplated that the engine should be removed to the state of Illinois, and used by Conant & Co., in the prosecution of their business as constructors of a railroad. It was accordingly taken there and put to the use for which it was purchased; but while in the possession of Conant & Co., who exercised complete ownership over it, it was seized and sold, in the local courts of Illinois, as their property. These proceedings were valid in the jurisdiction where they took place, and must be respected by the federal tribunals.

The Rhode Island Locomotive Works took the risk of losing its lien in case the property, while in the possession of Conant & Co., should be levied on by their creditors, and it cannot complain, as the laws of Illinois pointed out a way to preserve and perfect its lien.

By stipulation the judgment of the court below is affirmed as to the locomotive Olney, No. 1.

As to the locomotive and tender called Alfred N. Smyser No. 3, judgment reversed.

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acc. Shepard v. Haynes.

LEES v. HARDING, WHITMAN & CO.

(Court of Errors and Appeals of New Jersey, 1905. 68 N. J. Eq. 622, 60 Atl. 352.)

This case involves the ownership of machinery of the Philadelphia Worsted Company, an insolvent corporation of this state. The receiver makes no claim and submits himself to the judgment of the court. The controversy is between the executors of Daniel Lees, deceased, formerly of Lenni, Pa., and Harding, Whitman & Co., a copartnership, the members of which do not reside in the state of New Jersey. The machinery was formerly owned by Lees at Lenni. On November 24, 1899, an agreement was entered into between Lees and the Philadelphia Worsted Company which purported by its terms to lease the machinery in question to the company for the term of two and one-half years for a rental of $6,000, payable $2,000 on the execution of the agreement, $1,000 in 12 months, $1,000 in 18 months, $1,000 in 2 years, and $1,000 at the expiration of the term; the deferred payments to bear 1 per cent. interest. The company agreed to pay the rent, and to surrender the property at the expiration of the lease. The agreement then provided that if, upon surrendering the property, the rent having been fully paid, the company desired to purchase the leased

∇ vendor.
△ attaching creditors.
vendees who failed.

property, Lees would sell the same for $6,000, with 6 per cent. interest, and that the amount received for rent should be applied upon the purchase price. In case of default in payment of the rent or performance of the covenants by the company, the vendor might take possession of the property. The machinery was delivered at the date of the execution of the agreement to the company at Lenni for use in its mill at that place, and was there used by the company continuously until April, 1901. In April and May, 1901, it was moved into this state, with the knowledge, but against the will of Lees. Lees died May 30, 1901. The corporation was adjudged insolvent, and a receiver appointed in this state October 22, 1903. At the time of his appointment a suit by Harding, Whitman & Co. against the corporation was pending. Judgment was entered October 26, 1903, execution issued, and a levy made October 30, 1903. The judgment creditors were without notice of the lease or agreement for conditional sale. That agreement was recorded in Camden county, in this state, October 27, 1903.

F. 1.

SWAYZE, J. The agreement in question under Pennsylvania law constituted a bailment, and the title of Lees was good in Pennsylvania. Stadtfeld v. Huntsman, 92 Pa. 53, 37 Am. Rep. 661; Ditman v. Cottrell, 125 Pa. 606, 17 Atl. 504; Brown v. Billington, 163 Pa. 76, 29 Atl. 904, 43 Am. St. Rep. 780; Lippincott v. Scott, 198 Pa. 283, 47 Atl. 1115, 82 Am. St. Rep. 801; Marvin Safe Co. v. Norton, 48 N. J. Law, 410, 7 Atl. 418, 57 Am. Rep. 566. For the purposes of this case we may assume that the contract would here be construed as a contract for conditional sale, which, under the New Jersey statute, if it is applicable, would be void as against judgment creditors not having notice thereof, unless recorded as directed by the statute. The question to be decided is whether the validity of the appellants' title is to be determined according to the law of Pennsylvania or the law of New Jersey. The general rule is that the assignment of a movable, wherever situate, in accordance with the law of the owner's domicile, is valid (Dicey on Conflict of Laws, 535, rule 142); but this is subject to the rule that "an assignment of a movable which can be touched, giving a good title thereto according to the law of the country where the movable is situate at the time of the assignment, is valid." Rule 140. These rules have been the settled law of the English courts since the decision of Cammell v. Sewell in the Exchequer Chamber in 1860. 5 H. & N. 728; 5 English Ruling Cases, 891; 29 L. J. Ex. 350. Cammell v. Sewell was approved in the House of Lords in 1870. Castrique v. Imrie, 39 L. J. C. P. 350, L. R. 4 H. L. 414; 5 English Ruling Cases, 899. See especially the opinion of Lord Blackburn. See, also, In re Queensland Mercantile & Agency Company (1891) 1 Ch. 536, 60 L. J. Ch. 579, affirmed on a different ground (1892) 1 Ch. 219, 61 L. J. Ch. 145, but without dissent on this point. The rule has been applied to bills of exchange transferred in a foreign country. Alcock v. Smith (1892) 1 Ch. 238, 61 L. J. Ch. 161, and in the most recent case Embericos v. Anglo-Austrian Bank (1904) 2 K. B. 870, 73 L. J. K. B.

F. 2.

Q.

Seem contra Cogdell v. Burke

993. In Hooper v. Gumm, L. R. 2 Ch. 282, 36 L. J. Ch. 605, the general rule was recognized, but the holder of the incumbrance, which was valid by American law, intentionally concealed it, and was not permitted to assert it against a bona fide purchaser for valuable consideration under an English contract.

The cases in our own courts are not in conflict with the rule of the English courts. In Varnum v. Camp (1833) 13 N. J. Law, 326, 25 Am. Dec. 476, two classes of goods were involved. Some were goods in the store at Paterson, in this state, at the time the assignment was made in New York; some were in the store in New York, and were sent to Paterson after the assignment. It was held that the assignment did not transfer the title to the goods then at Paterson, but did transfer the title to the goods then in New York; and accordingly it was held that the plaintiff was entitled to a portion of the articles replevied and the defendant to the residue. The court thus clearly recognized that the validity of the transfer depended upon the actual situs of the goods. The opinion of Chief Justice Ewing and his citations from other cases show that this was the view held by him. Thus he says at page 331 of 13 N. J. Law (25 Am. Dec. 476): "Every country has the right of regulating the transfer of all personal property within its territory; but when no positive regulation exists the owner transfers it at his pleasure." And on page 332 of 13 N. J. Law (25 Am. Dec. 476) he quotes with approval the following language of Justice Johnson in Smith v. Union Bank of Georgetown, 5 Pet. (U. S.) 518, 8 L. Ed. 212: "That personal property has no situs seems rather a metaphysical position than a practical and legal truth." "In point of fact it cannot be questioned that goods found within the limits of a sovereign's jurisdiction are subject to his laws. It would be an absurdity, in terms, to affirm the contrary." In Frazier v. Fredericks (1853) 24 N. J. Law, 162, it was held that a voluntary assignment made in Pennsylvania for the benefit of creditors would pass the title to a boat lying at a wharf in New Jersey as against an attaching creditor; but in that case there was no conflict between the law of Pennsylvania and the law of New Jersey. Chief Justice Green said: "Admitting the assignment to be valid by the laws of Pennsylvania, where the assignment was executed, there is nothing in its terms repugnant to the provisions of our statutes or to the policy of our laws." In Runyon v. Groshon (1858) 12 N. J. Eq. 86, the original owner of the picture and both claimants were domiciled in New Jersey, and the complainant was foreclosing his mortgage in our courts. There was no difficulty in the way of following the law of the domicile. The chancellor recognized the right of New York to declare how personal property situated there should be transferred, and added: "The property is protected by her laws, and it is but reasonable that it must be held and transferred agreeable to such regulations as that state may see fit to adopt." In Moore v. Bonnell (1864) 31 N. J. Law, 90, an assignment made in New York by a resident of that state was held to

transfer a debt due from a resident of this state, although the assignment made preferences, and would have been invalid under our law. The case did not involve the title to tangible goods situate in New Jersey, and the citation by the learned Chief Justice from Story on the Conflict of Laws recognizes the difference in a case where the particular property, from its nature, has a necessarily implied locality. Moreover, the question in Moore v. Bonnell arose between an attaching creditor whose domicile was the same as the domicile of the assignor, and in this respect the case resembled Runyon v. Groshon.

The New Jersey cases thus far cited were either in the Supreme Court or in the Court of Chancery. Bentley v. Whittemore (1868) 19 N. J. Eq. 462, 97 Am. Dec. 671, was in this court. In that case a resident of New York made an assignment with preferences for the benefit of his creditors, and executed in due form a conveyance to his assignees of land in this state. The assignees sold the land to Bentley, who paid $6,000 in cash and assumed a mortgage for $2,000. Another subsisting mortgage was canceled at the time of the sale. Subsequently creditors of the assignor, all of whom were nonresidents of this state, obtained judgments here, and levied upon the land. We held that the conveyance to the assignee passed title to land in New Jersey, although the preferences were forbidden by our law. The ground of the decision, however, was that the deed was sufficient to pass the title in New Jersey. It was only the method of distribution of the assets of the assignor among his creditors that was inimical to our laws. That this was what Chief Justice Beasley had in mind is shown by his statement that "no doubt is intended to be hinted as to the settled existence of the rule that the validity of every disposition of real estate must depend upon the law of the country in which that estate is situated." He added: "The deed in question has been regularly executed, acknowledged, and recorded, and is in due legal form. In all ceremonious parts, therefore, the transaction is a compliance with our land regulations. What, then, is to render this title defeasible? I can imagine nothing that can be set up to invalidate it, except the idea that the distribution of the assignment, to which this conveyance is ancillary, militates with the provisions of our statute upon that subject." And it was properly held that creditors not resident in New Jersey could not object to a method of distribution of the estate which was legal by the law of the domicile. In Parr v. Brady (1874) 37 N. J. Law, 201, a chattel mortgage was executed by a resident of New York upon a coach then in New York, and filed in New York in accordance with the laws of that state. The coach was subsequently brought by the owner—the mortgagor—into New Jersey, and sold here to a bona fide purchaser. The mortgage was not filed in this state, as then required by our statute. The case therefore involved a conflict between the laws of two states, in both of which the chattel had at different times its situs, and the court properly sustained the title under the earlier transfer. The opinion stated the general rule, as stated in the

beginning of this opinion, that the law of the owner's domicile must govern, but recognized that "this rule has its exceptions when the laws of different jurisdictions are in conflict, and particularly in cases where the situs rei at the time of the contract is in another state." In Marvin Safe Co. v. Norton (1886) 48 N. J. Law, 410, 7 Atl. 418, 57 Am. Rep. 566, in the Supreme Court, the title was determined according to the law of the situs. The title reserved by the safe company was valid in Pennsylvania as long as the goods were in that state. The title acquired by Norton in New Jersey, under New Jersey law, was only such title as his vendor, Schwartz, then had, which was only a conditional title; and it was held that this title could not be made absolute as to tangible goods in New Jersey by a provision of the Pennsylvania law. There was no conflict between the title to the goods in Pennsylvania and the title to the goods in New Jersey; on the contrary, it was the very title acquired in Pennsylvania which subsequently passed by the transfer in New Jersey. In Cronan v. Fox (1889) 50 N. J. Law, 417, 14 Atl. 119, the title acquired by Fox in Maryland was at the time a valid title. It was invalid in Maryland in the event of failure to record as against creditors or purchasers; but no rights of creditors or purchasers intervened while the cattle were in Maryland, and this court held that the liability of the property to be seized and sold under writ of attachment must be determined by the law of the state where the property then was, notwithstanding the domicile of all the claimants was in another state. In Knowles Loom Works v. Vacher (1895) 57 N. J. Law, 490, 31 Atl. 306, 33 L. R. A. 305, the Supreme Court held that the situs of the property, and not the lex loci contractus, determined the validity of the sale. The contract in that case was between a Massachusetts corporation which owned the looms then located in Worcester, sold them under a contract made in New York, and delivered them in Paterson. It was held that the situs of the looms was in this state. That was the place where the parties themselves contemplated that the looms should be permanently located. The judgment was affirmed in this court upon Justice Van Syckel's opinion. In Woolley v. Geneva Wagon Co. (1896) 59 N. J. Law, 278, 35 Atl. 789, the wagons were at the time of the contract in New York. The vendee, and apparently the vendor also, was a resident of that state, and the property was brought into New Jersey without the knowledge of the vendor. Chief Justice Beasley held that our statute did not apply. Manifestly the situs of the wagons had never been lawfully in New Jersey. They had been brought here without the owner's consent.

In the federal courts, also, it is held that the title of tangible chattels is determined by the law of the situs. Green v. Van Buskirk, 5 Wall 307, 18 L. Ed. 599; Id., 7 Wall. 139, 19 L. Ed. 109; Hervey v. Rhode Island Locomotive Works, 93 U. S. 664, 23 L. Ed. 1003.

In the present case the vice chancellor held that the law of the domi-

cile of the purchaser must control; that the purchaser was a New Jersey corporation, and the transaction was governed by our statute. The case exhibits the difficulty which arises in determining the question by the law of the domicile. Not only may the parties have different domiciles, as in the present case, but several persons may be interested either as vendors or vendees, each with a different domicile. The difficulty is not met by adopting the law of the domicile of the owner as the rule, for the very question to be decided is, who is the owner? The rule which looks to the law of the situs has the merit of adopting the law of the jurisdiction which has the actual control of the goods and the merit of certainty. It is not necessary to the decision of the present case to go as far as the English cases have gone in following the law of the situs. The contract now in question was made in Pennsylvania, and was intended by the parties to be performed there. The chattels were at the time in Pennsylvania, and were removed to this state without the consent of the vendor. In Pennsylvania there was no transfer of title, but a mere contract of bailment. We think in such a case the law of Pennsylvania must control. The vice chancellor relied upon the case of Knowles Loom Works v. Vacher, 57 N. J. Law, 490, 31 Atl. 306, 33 L. R. A. 305, but that case was not decided upon the ground that the vendee was a New Jersey corporation, but upon the ground that the property was to be delivered, and was delivered to and held by, the purchaser in this state. Justice Van Syckel said that the situs of the property, and not the lex loci contractus, determined the validity of such sales. What the court held was that the situs, under the circumstances of that case, was in New Jersey. In the present case the place of contract and the situs at the time was in Pennsylvania. It is not necessary to decide whether or not the state of New Jersey, by virtue of the power it may exert over property within its jurisdiction, might divest a title which was good in Pennsylvania; for, in our view of the case, the law of this state does not have that effect. The contract between Lees and the Philadelphia Worsted Company was valid at common law. Cole v. Berry, 42 N. J. Law, 308, 36 Am. Rep. 511. This rule was modified by a statute in 1889 (P. L. 1889, p. 421; Gen. St. p. 891, §§ 185–191), which now appears in the act respecting conveyances (Revision of 1898) P. L. 1898, pp. 699, 700, §§ 71, 72. We think that this act is intended to affect contracts for goods subject to the jurisdiction of New Jersey at the time the contract is made, or intended by the parties at that time to be brought within the jurisdiction of this state. We are led to this conclusion by the provisions of the seventy-second section, which require the contract to be recorded in the office of the clerk of the court of common pleas of the county wherein the party contracting to buy, if a resident of this state, shall reside at the time of the execution thereof, and, if not a resident of this state, then in the clerk's office of the county where the property bought shall be at the

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time of the execution of such instrument. It would be of no avail to require record in the county where the vendee resides at the time of the execution of the instrument unless it were meant that the record should be substantially contemporaneous with the date of the instrument. To require record in that county two years later, when the vendee might then reside elsewhere, would not serve the statute's purpose of constructive notice to judgment creditors and subsequent purchasers and mortgagees in good faith.

There is another difficulty in the way of applying our statute to the present case. The statute applies only to conditional sales. The contract now in question was a contract of bailment, but not a contract of conditional sale as long as the goods were subject to the jurisdiction of Pennsylvania. Taking the view of the case most favorable to the judgment creditors, the contract did not become a contract of conditional sale until the goods were moved to New Jersey, a year and a half after its execution. It would be a singular construction which would require a contract to be recorded in a county where one of the parties resides a year and a half before the contract subject to the operation of the statute. The authorities sustain the view we have adopted. In Varnum v. Camp, 13 N. J. Law, 326, 25 Am. Dec. 476, the title of the assignee to the goods in New York at the time of the assignment was sustained notwithstanding the goods were afterward brought to Paterson, and there levied upon. In Parr v. Brady, 37 N. J. Law, 201, the title under the New York chattel mortgage was sustained, although the goods were afterwards brought to this state and sold, and although the mortgagee had not complied with the provisions of our chattel mortgage act requiring the filing of the mortgage in the same language used in section 72 of the act respecting conveyances as to recording contracts of conditional sale. The Supreme Court said: "The intention to do so [i. e., to prevent a foreign mortgage from having effect in this state] ought to be clearly manifested when the object is to abridge the validity of a common-law contract." In Woolley v. Geneva Wagon Co., 59 N. J. Law, 278, 35 Atl. 789, it was the impossibility of complying with the statute that led the court to hold it not applicable. The courts of other jurisdictions are almost unanimous in sustaining a title good under the law of the original situs, although not good under the law of the jurisdiction to which the property may be removed by one party without the consent of the other. Bank of United States v. Lee, 13 Pet. (U. S.) 107, 10 L. Ed. 81; Shapard v. Hynes, 104 Fed. 449, 45 C. C. A. 271, 52 L. R. A. 675 (a well-considered opinion in the United States Circuit Court of Appeals); Edgerly v. Bush, 81 N. Y. 199; Nichols v. Mase, 94 N. Y. 160; Cleveland Mach. Works v. Lang, 67 N. H. 348, 31 Atl. 20, 68 Am. St. Rep. 675.

In our judgment, the title of Lees' executors to the machinery in question was valid, and the order should have directed the receiver to

surrender possession thereof to them. It must therefore be reversed, with costs, and the cause remitted to the Court of Chancery for proceedings in conformity with this opinion.[22]

BARNETT v. KINNEY.

(Supreme Court of the United States, 1893. 147 U. S. 476, 13 Sup. Ct. 403, 37 L. Ed. 247.)

M. H. Lipman, a resident of the territory of Utah, made a voluntary assignment on November 23, 1887, to Barnett, covering real and personal property in Utah and personal property in Alturas county, Idaho, preferring certain creditors. Such preferences were valid according to the laws of Utah, but not valid according to the laws of Idaho. On November 25, 1887, Barnett, as assignee, took actual possession of the personal property in Idaho, and on November 26th filed the assignment for record in the proper office in Alturas county. On the same day, but after the filing of the assignment and with knowledge thereof, the sheriff of Alturas county, Kinney, took possession of the property under a writ of attachment in favor of the St. Paul Knitting Works, a Minnesota corporation, against Lipman. Barnett thereupon brought replevin. The judgment rendered in favor of the plaintiff in the lower court was reversed by the Supreme Court of the territory.

[22] See Weinstein v. Freyer, 93 Ala. 257, 9 South. 285, 12 L. R. A. 700 (1891).

As to conditional sales, see, in general, 64 L. R. A. 833–836. As to validity of warehouse receipts, see In re St. Paul & K. C. Grain Co., 89 Minn. 98, 94 N. W. 218, 99 Am. St. Rep. 549 (1903).

"No sale, mortgage, hypothecation, or conveyance of any vessel or part of any vessel of the United States is valid as to third parties unless it is recorded in the office of the collector of customs where such vessel is registered or enrolled." Section 4192, Rev. St. U. S. (U. S. Comp. St. 1901, p. 2837).

See, also, Thuret v. Jenkins, 7 Mart. (La.) 318, 12 Am. Dec. 508 (1820); Minor, Conflict of Laws, § 120.

As to maritime liens, see, in general, 19 Am. & Eng. Encyc. Law, 1079–1137, and 26 Cyc. 743–816; and as to law governing, 26 Cyc. 809–810.

CONTINENTAL LAW.—A mortgage, conditional sale, pledge, or other property right validly created by the lex rei sitæ will be recognized in another jurisdiction to which the chattel has been removed. R. G. Feb. 28, 1893 (3 Niemeyer, 622). But not in the face of some pronounced local policy; e. g., where general liens or reservations of title are unknown to the law of such jurisdiction. Obertribunal, Berlin, April 8, 1875 (31 Seuffert's Archiv. 257); R. G. Nov. 25, 1895 (6 Niemeyer, 424). Or where a pledge without delivery of title is not recognized in the new jurisdiction. Cass. March 19, 1872 (D. 1874, 1, 465).

The rank of maritime liens is determined in Germany by the lex fori, R. G. Feb. 9, 1900 (10 Niemeyer, 472); R. G. Nov. 25, 1890 (1 Niemeyer, 365); in France, by the law of the flag, App. Rouen, May 10, 1905 (21 Autran, 293).

Consult, in general, Ch. Lyon-Caen, Études de droit international privé maritime, 4 Clunet, 489–495; 9 Clunet, 241–260, 488–500, 593–606. C. E. Lefebre, Des conflits des lois en matière de propriété de navires, d'hypothèques et autres droits réels, 20 Autran, 796–806.

2 Idaho, 740, 23 Pac. 922, 24 Pac. 624. An appeal was taken to the Supreme Court of the United States.[23]

FULLER, C. J. The Supreme Court of the territory held that a nonresident could not make an assignment, with preferences, of personal property situated in Idaho, that would be valid as against a nonresident attaching creditor, the latter being entitled to the same rights as a citizen of Idaho; that the recognition by one state of the laws of another state governing the transfer of property rested on the principle of comity, which always yielded when the policy of the state where the property was located had prescribed a different rule of transfer from that of the domicile of the owner; that this assignment was contrary to the statutes and the settled policy of Idaho, in that it provided for preferences; that the fact that the assignee had taken and was in possession of the property could not affect the result; and that the distinction between a voluntary and an involuntary assignment was entitled to no consideration.

Undoubtedly there is some conflict of authority on the question as to how far the transfer of personal property by assignment or sale, lawfully made in the country of the domicile of the owner, will be held to be valid in the courts of another country, where the property is situated, and a different local rule prevails.

We had occasion to consider this subject somewhat in Cole v. Cunningham, 133 U. S. 107, 129, 10 Sup. Ct. 269, 33 L. Ed. 538, and it was there said: "Great contrariety of state decision exists upon this general topic, and it may be fairly stated that, as between citizens of the state of the forum, and the assignee appointed under the laws of another state, the claim of the former will be held superior to that of the latter by the courts of the former; while, as between the assignee and citizens of his own state and the state of the debtor, the laws of such state will ordinarily be applied in the state of the litigation, unless forbidden by, or inconsistent with, the laws or policy of the latter. Again, although, in some of the states, the fact that the assignee claims under a decree of a court or by virtue of the law of the state of the domicile of the debtor and the attaching creditor, and not under a conveyance by the insolvent, is regarded as immaterial, yet, in most, the distinction between involuntary transfers of property, such as work by operation of law, as foreign bankrupt and insolvent laws, and a voluntary conveyance is recognized. The reason for the distinction is that a voluntary transfer, if valid where made, ought generally to be valid everywhere, being the exercise of the personal right of the owner to dispose of his own, while an assignment by operation of law has no legal operation out of the state in which the law was passed. This is a reason which applies to citizens of the actual situs of the property when that is elsewhere than at the domicile of the insolvent, and the

[23] This statement of facts has been substituted for that of the original report.

controversy has chiefly been as to whether property so situated can pass even by a voluntary conveyance."

We have here a voluntary transfer of his property by a citizen of Utah for the payment of his debts, with preferences, which transfer was valid in Utah, where made, and was consummated by the delivery of the property in Idaho, where it was situated, and then taken on an attachment in favor of a creditor not a resident or citizen of Idaho. Was there anything in the statutes or established policy of Idaho invalidating such transfer?

Title 12 of part 3 of the Revised Statutes of the Territory of Idaho, entitled "Of Proceedings in Insolvency" (Rev. St. §§ 5875–5932), provided that "no assignment of any insolvent debtor, otherwise than as provided in this title, is legal or binding on creditors"; that creditors should share pro rata, "without priority or preference whatever"; for the discharge of the insolvent debtor upon compliance with the provisions of the title, by application for such discharge by petition to the district court of the county in which he had resided for six months next preceding, with schedule and inventory annexed, giving a true statement of debts and liabilities, and a description of all the insolvent's estate, including his homestead, if any, and all property exempt by law from execution. The act applied to corporations and partnerships, and declared that, if the partners resided in different counties, that court in which the petition was first filed should retain jurisdiction over the case. Nothing is clearer from its various provisions than that the statute had reference only to domestic insolvents. As pointed out by Judge Berry in his dissenting opinion, the first section of the 58 upon this subject, in providing that "every insolvent debtor may upon compliance with the provisions of this title, be discharged from his debts and liabilities," demonstrates this. The Legislature of Idaho certainly did not attempt to discharge citizens of other jurisdictions from their liabilities, nor intend that personal property in Idaho, belonging to citizens of other states or territories, could not be applied to the payment of their debts unless they acquired a six months' residence in some county of Idaho, and went through its insolvency court.

The instrument in controversy did not purport to be executed under any statute, but was an ordinary common-law assignment, with preferences, and as such was not, in itself, illegal. Jewell v. Knight, 123 U. S. 426, 434, 8 Sup. Ct. 193, 31 L. Ed. 190. And it was found as a fact that it was valid under the laws of Utah. While the statute of Idaho prescribed pro rata distribution, without preference, in assignments under the statute, it did not otherwise deal with the disposition of his property by a debtor, nor prohibit preferences between nonresident debtors and creditors through an assignment valid by the laws of the debtor's domicile. No just rule required the courts of Idaho, at the instance of a citizen of another state, to adjudge a transfer, valid at common law and by the law of the place where it was made, to be invalid, because preferring creditors elsewhere, and therefore in con-

travention of the Idaho statute and the public policy therein indicated in respect of its own citizens, proceeding thereunder. The law of the situs was not incompatible with the law of the domicile.

In Halsted v. Straus (C. C.) 32 Fed. 279, which was an action in New Jersey, involving an attachment there by a New York creditor as against the voluntary assignee of a New York firm, the property in dispute being an indebtedness of one Straus, a resident of New Jersey, to the firm, Mr. Justice Bradley remarked: "It is true that the statute of New Jersey declares that assignments in trust for the benefit of creditors shall be for their equal benefit, in proportion to their several demands, and that all preferences shall be deemed fraudulent and void; but this law applies only to New Jersey assignments, and not to those made in other states, which affect property or creditors in New Jersey. It has been distinctly held by the courts of New Jersey that a voluntary assignment made by a nonresident debtor, which is valid by the law of the place where made, cannot be impeached in New Jersey, with regard to property situated there, by nonresident debtors. Bentley v. Whittemore, 19 N. J. Eq. 462, 97 Am. Dec. 671; Moore v. Bonnell, 31 N. J. Law, 90. The execution of foreign assignments in New Jersey will be enforced by its courts as a matter of comity, except when it would injure its own citizens; then it will not. If Deering, Milliken & Co. were a New Jersey firm, they could successfully resist the execution of the assignment in this case. But they are not; they are a New York firm. New York is their business residence and domicile. The mere fact that one of the partners resides in New Jersey cannot alter the case. The New Jersey courts, in carrying out the policy of its statute for the protection of its citizens, by refusing to carry into effect a valid foreign assignment, will be governed by reasonable rules of general jurisprudence; and it seems to me that to refuse validity to the assignment in the present case would be unreasonable and uncalled for."

In May v. First Nat. Bank, 122 Ill. 551, 13 N. E. 806, the Supreme Court of Illinois held that the provision in the statute of that state prohibiting all preferences in assignments by debtors applied only to those made in the state, and not to those made in other states; that the statute concerned only domestic assignments and domestic creditors; and the court, in reference to the contention that, if not against the terms, the assignment was against the policy of the statute, said: "An assignment giving preferences, though made without the state, might, as against creditors residing in this state, with some reason, be claimed to be invalid, as being against the policy of the statute in respect of domestic creditors; that it was the policy of the law that there should be an equal distribution in respect to them. But, as the statute has no application to assignments made without the state, we cannot see that there is any policy of the law which can be said to exist with respect to such assignments, or with respect to foreign creditors, and why nonresidents are not left free to execute voluntary assignments,

with or without preferences, among foreign creditors, as they may see fit, so long as domestic creditors are not affected thereby, without objection lying to such assignments that they are against the policy of our law. The statute was not made for the regulation of foreign assignments, or for the distribution, under such assignments, of a debtor's property among foreign creditors."

In Frank v. Bobbitt, 155 Mass. 112, 29 N. E. 209, a voluntary assignment made in North Carolina, and valid there, was held valid and enforced in Massachusetts, as against a subsequent attaching creditor of the assignors, resident in still another state, and not a party to the assignment. The Supreme Judicial Court observed that the assignment was a voluntary, and not a statutory, one; that the attaching creditors were not resident in Massachusetts; that at common law, in that state, an assignment for the benefit of creditors which created preferences was not void for that reason; and that there was no statute which rendered invalid such an assignment when made by parties living in another state, and affecting property in Massachusetts; citing Train v. Kendall, 137 Mass. 366. Referring to the general rule that a contract, valid by the law of the place where made, would be regarded as valid elsewhere, and stating that "it is not necessary to inquire whether this rule rests on the comity which prevails between different states and countries, or is a recognition of the general right which every one has to dispose of his property or to contract concerning it as he chooses," the court said that the only qualification annexed to voluntary assignments made by debtors living in another state had been "that this court would not sustain them if to do so would be prejudicial to the interests of our own citizens, or opposed to public policy," and added: "As to the claim of the plaintiffs that they should stand as well as if they were citizens of this state, it may be said, in the first place, that the qualification attached to foreign assignments is in favor of our own citizens as such, and, in the next place, that the assignment being valid by the law of the place where it was made, and not adverse to the interests of our citizens, nor opposed to public policy, no cause appears for pronouncing it invalid." And see, among numerous cases to the same effect, Butler v. Wendell, 57 Mich. 62, 23 N. W. 460, 58 Am. Rep. 329; Receiver of State Bank at New Brunswick v. First Nat. Bank, 34 N. J. Eq. 450; Egbert v. Baker, 58 Conn. 319, 20 Atl. 466; Chafee v. Fourth Nat. Bank, 71 Me. 514, 36 Am. Rep. 345; Ockerman v. Cross, 54 N. Y. 29; Weider v. Maddox, 66 Tex. 372, 1 S. W. 168, 59 Am. Rep. 617; Thurston v. Rosenfield, 42 Mo. 474, 97 Am. Dec. 351.

We do not regard our decision in Green v. Van Buskirk, 5 Wall. 307, 18 L. Ed. 599; Id., 7 Wall. 139, 19 L. Ed. 109, as to the contrary. That case was fully considered in Cole v. Cunningham, supra, and need not be re-examined. The controversy was between two creditors of the owner of personalty in Illinois, one of them having obtained judgment in a suit in which the property was attached, and the other claim-

ing under a chattel mortgage. By the Illinois statute such a mortgage was void as against third persons, unless acknowledged and recorded as provided, or unless the property was delivered to and remained with the mortgagee; and the mortgage in that case was not acknowledged and recorded, nor had possession been taken. All parties were citizens of New York, but that fact was not considered sufficient to overcome the distinctively politic and coercive law of Illinois.

In our judgment the Idaho statute was inapplicable, and the assignment was in contravention of no settled policy of that territory. It was valid at common law, and valid in Utah, and, the assignee having taken possession before the attachment issued, the district court was right in the conclusions of law at which it arrived.

The judgment is reversed, and the cause remanded to the Supreme Court of the state of Idaho for further proceedings not inconsistent with this opinion. Judgment reversed.[24]

[24] As to assignments for the benefit of creditors, see Edson R. Sunderland, Foreign Voluntary Assignments for the Benefit of Creditors, 2 Mich. Law Rev. 112–126, 180–189; 65 L. R. A. 353–363; Minor, Conflict of Laws, §§ 133–135. As to when an assignment is deemed voluntary, see Security Trust Co. v. Dodd, 173 U. S. 624, 19 Sup. Ct. 545, 43 L. Ed. 835 (1899), post, p. 741.

A voluntary assignment, valid where made, will operate to pass title to personal property wherever situated, even as to local creditors, provided it would not have been ineffective as to attaching creditors had it been made at the situs of the property. First Nat. Bank v. Walker, 61 Conn. 154, 22 Atl. 696 (1891); Train v. Kendall, 137 Mass. 366 (1884); J. M. Atherton Co. v. Ives (C. C.) 20 Fed. 894 (1884). In Illinois, however, local creditors are always preferred to the assignee under a foreign assignment.

"In the absence of claims of domestic creditors, the assignee under a valid foreign assignment may reduce to his possession the property, and collect the debts assigned to him within this state; and debtors here, owing the assignor, and having no set-off, will be compelled to pay the assignee. But if the foreign assignment, if made here, would be set aside as fraudulent, or is contrary to the policy of our laws, our courts will not enforce it as against attaching creditors, whether foreign or domestic, although it may be valid in the state where made. May v. Wannemacher, 111 Mass. 202 (1872); Zipcey v. Thompson, 1 Gray (Mass.) 243 (1854); Fall River Iron Works Co. v. Croade, 15 Pick. (Mass.) 11 (1833); Kelly v. Crapo, 45 N. Y. 86, 6 Am. Rep. 35 (1871); Guillander v. Howell, 35 N. Y. 657 (1866). As a voluntary foreign assignment, valid in the state where made, is enforced in this state as a matter of comity, our courts will not enforce it to the prejudice of our citizens who may have demands against the assignor. It is contrary to the policy of our laws to allow the property or funds of a nonresident debtor to be withdrawn from this state before his creditors residing here have been paid, and thus compel them to seek redress in a foreign jurisdiction. So it was held in Heyer v. Alexander, 108 Ill. 385 (1884), that a voluntary assignment of a nonresident debtor's property, valid under the laws of the state where made, will not be enforced here as against domestic attaching creditors." Woodward v. Brooks, 128 Ill. 222, 227, 20 N. E. 685, 3 L. R. A. 702, 15 Am. St. Rep. 104 (1889).

The title acquired under a foreign assignment has been recognized, even as to local creditors, though such assignment would have been invalid if made under the lex rei sitæ et fori. Livermore v. Jenckes, 21 How. 126, 16 L. Ed. 55 (1858). Most courts under such circumstances prefer, however, resident creditors. Zipcey v. Thompson, 1 Gray (Mass.) 243 (1854); Bryan v. Brisbin, 26 Mo. 423, 72 Am. Dec. 219 (1858); In re Dalpay, 41 Minn. 532, 43 N. W. 564, 6 L. R. A. 108, 16 Am. St. Rep. 729 (1889). But not creditors of the

II. Intangible.

WILLIAMS v. COLONIAL BANK.

(Court of Appeal, 1888. 57 L. J. Ch. [N. S.] 826, 38 Ch. D. 388.)

John M. Williams, a resident of England, was the owner of 1,210 shares of stock in the New York Central & Hudson River Railroad Company. His executors, in order, as they alleged, to have the shares transferred to their own names, sent the certificates to Thomas & Co., brokers, who had usually acted for Mr. Williams, in order that they might send them to America. Upon the request of Thomas & Co. the executors signed the certificates in blank. Thomas & Co. deposited the certificates, with the transfers still in blank, with the defendants, the Colonial Bank, as security for the balance due from them to the bank. Later 50 of the certificates were given up to Thomas & Co.,

state in which the assignment was made. Whipple v. Thayer, 16 Pick. (Mass.) 25, 26 Am. Dec. 626 (1834); Bentley v. Whittemore, 19 N. J. Eq. 462, 97 Am. Dec. 671 (1868). Nor creditors of a third state. Bentley v. Whittemore, 19 N. J. Eq. 462, 97 Am. Dec. 671 (1868); May v. First Nat. Bank, 122 Ill. 551, 13 N. E. 806 (1887); Frank v. Bobbitt, 155 Mass. 112, 29 N. E. 209 (1891); Cook v. Van Horn, 81 Wis. 291, 50 N. W. 893 (1891).

The Massachusetts doctrine is expressed by the following quotation from the opinion of Wells, J., in May v. Wannemacher, 111 Mass. 202, 208 (1872): "An assignment made by the debtor himself in another state, which, if made here, would be set aside for want of consideration or delivery, or as fraudulent, or contravening the policy of the law of this Commonwealth, will not be sustained here on attachment, although valid in the state or country where made. * * * But in each case the assignment is always sustained so far as it affects property which was at the time within the jurisdiction where it was made. Benedict v. Parmenter, 13 Gray (Mass.) 88 (1859); Wales v. Alden, 22 Pick. (Mass.) 245 (1839). And also as against all citizens of that jurisdiction, even when seeking a remedy here against property found here."

As to constitutionality of discrimination between resident and nonresident creditors, see Reynolds v. Adden, 136 U. S. 348, 10 Sup. Ct. 843, 34 L. Ed. 360 (1890); Blake v. McClung, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. Ed. 432 (1898); Belfast Sav. Bank v. Stowe, 92 Fed. 100, 34 C. C. A. 229 (1899); The Disconto Gesellschaft v. Umbreit, 208 U. S. 570, 28 Sup. Ct. 337, 52 L. Ed. 625 (1908). See, also, Chafee v. Fourth Nat. Bank, 71 Me. 514, 36 Am. Rep. 345 (1880); Sturtevant v. Armsby Co., 66 N. H. 557, 23 Atl. 368, 49 Am. St. Rep. 627 (1891); Hilliard v. Enders, 196 Pa. 587, 46 Atl. 839 (1900).

As to who are included within the term "local" creditors, see Minor, Conflict of Laws, § 8.

As to the effect of a voluntary assignment upon vessels on the high seas or in foreign waters, see Crapo v. Kelly, 16 Wall. 610, 21 L. Ed. 430 (1872); Moore v. Willett, 35 Barb. (N. Y.) 663 (1861); Koster v. Merritt, 32 Conn. 246 (1864).

If real estate is embraced in a foreign assignment, title will pass to the assignee only under a deed executed in conformity with the law of the situs. King v. Glass, 73 Iowa, 205, 34 N. W. 820 (1887). In other respects, some courts apply the rules governing assignments of personal property. Bentley v. Whittemore, 19 N. J. Eq. 462, 97 Am. Dec. 671 (1868); May v. First Nat. Bank, 122 Ill. 551, 13 N. E. 806 (1887); Memphis Sav. Bank v. Houchens, 115 Fed. 96, 52 C. C. A. 176 (1902). Others apply the lex rei sitæ. Osborn v. Adams, 18 Pick. (Mass.) 245 (1836); Loving v. Pairo, 10 Iowa, 282, 77 Am. Dec. 108 (1860); Van Winkle v. Armstrong, 41 N. J. Eq. 402, 5 Atl. 449 (1886); Keane v. Chamberlain, 14 App. D. C. 84 (1899); Manton v. J. F. Seiberling & Co., 107 Iowa, 534, 78 N. W. 194 (1899).

who then deposited them with the London & Chartered Bank of Australia. Thomas & Co. were thereupon adjudicated bankrupts. Immediately after the bankruptcy the executors brought an action in England against the Colonial Bank and the trustee in bankruptcy of Thomas & Co., claiming a declaration that the deposit of the share certificates was made in fraud of the plaintiffs, and conferred no legal title on the bank, and claiming delivery to the plaintiffs of the certificates.

The executors also brought a similar action against the London & Chartered Bank of Australia. The two actions were heard together.[25]

LINDLEY, L. J.[26] * * * First of all, let me get rid of the American law, and I will point out before I have done to what extent that applies to the case. As I understand the evidence given by the American lawyers, if this transaction had taken place in America the banks would have got a good title to these shares, subject, possibly, to that question about the documents not being in order. I doubt very much whether the American lawyers would have attached much importance to that, and I shall assume throughout my judgment that if this transaction had taken place in America the banks would have succeeded. Now the American law is important up to a certain point and not beyond that point. We must look to the American law for the purpose of understanding the constitution of this company, and the proper mode of becoming a shareholder in it and acquiring shares in it. Further than that, it may be that the consequence of having acquired a title to the certificate may depend on American law, but the question how a title is to be acquired to a certificate by a transaction in this country does not depend on American law at all. One question, and to my mind the main question, resolves itself into this: who is entitled to the certificate? Now the certificate has been dealt with in England, and it has been dealt with by the executors in England, and the certificate is a chattel—and when considering who is entitled to a chattel bought or sold or pledged in England, it is English law and not American law that we have to deal with.[27] * * *

[25] This statement of facts has been substituted for that of the original report.

[26] Only a part of the opinion of Lindley, L. J., is given. Cotton and Bowen, L. JJ., delivered concurring opinions.

[27] See Black v. Zacharia, 3 How. (U. S.) 483, 11 L. Ed. 690 (1844); Masury v. Arkansas Nat. Bank (C. C.) 87 Fed. 381 (1898); London, Paris & American Bank v. Aronstein, 117 Fed. 601, 54 C. C. A. 663 (1902).

The existence of a lien in favor of a corporation upon the shares of its capital stock will depend upon the law of the state creating the corporation. Hammond v. Hastings, 134 U. S. 401, 10 Sup. Ct. 727, 33 L. Ed. 960 (1890).

In re QUEENSLAND MERCANTILE & AGENCY CO.

(Chancery Division, 1890, 1891. 60 L. J. Ch. 579, 1 Ch. 536.)

Adjourned summonses.

The first summons was taken out by the Australasian Investment Company, who thereby asked that out of £24,730. New Consols, and any cash in the hands of the liquidator in the English winding-up of the Queensland Mercantile & Agency Company, or in court, representing money received from Scotch shareholders in the Queensland Company, £12,660. might be paid to the Australasian Company in priority to all other payments.

The other summons was taken out by the Union Bank of Australia, who thereby asked that the English liquidator might be ordered to transfer to the Union Bank the whole of the New Consols and cash standing in his name, representing the proceeds of calls in his hands in respect of shares Nos. 1 to 2,500 in the Queensland Company.

The facts of the case as fully stated in the judgment were as follows:

The Queensland Mercantile & Agency Company was registered in Brisbane, and for several years before it was wound up carried on business in Queensland. The bankers of the company were the Union Bank of Australia, who, on the 28th of June and the 9th of September, 1886, took from the Queensland Company two debentures for £10,000. and £50,000. respectively in similar form, whereby the payment of such debentures was made a first charge on the uncalled capital receivable in respect of 2,500 specified shares in the Queensland Company, upon each of which shares £50. had been paid up, and £50. more remained uncalled.

On the 14th of December, 1886, the company passed resolutions calling up the balance of £50. per share, payable by four equal installments in February, April, June, and August, 1887, respectively. Notice of the call was given to the shareholders; but they never had any notice of the charge effected by the said two debentures in favor of the Union Bank.

On the 24th of February, 1887, a Scotch company, called the Australasian Investment Company, commenced an action in Scotland against the Queensland Company for negligence, and immediately afterwards, on the same day, issued a Scotch process, called "arrestment on the dependence of the action," against numerous holders of the Queensland Company's shares who were resident in Scotland, the effect of which, shortly, was that the calls payable by them to the Queensland Company were arrested in their hands, and the Australasian Company (the pursuers in the action) became secured creditors on the funds so arrested for the amounts for which they should establish their claim in the action.

In the months of May, July, and August, 1887, judgments were recovered in England in twenty-seven actions by Drake and others

against the Queensland Company. On the 2d of September, 1887, the Union Bank commenced an action in England against the Queensland Company in respect of money due to them other than that secured by the said two debentures; and on the 7th of September an order was made in all those actions for the appointment of a receiver to get in the calls from the shareholders in the Queensland Company.

On the 28th of October, 1887, an order was made in Queensland for the winding-up of the Queensland Company, and thereupon the £60,000. secured by the two debentures above mentioned became payable. On the 14th of January, 1888, a similar order was made in England. By various proceedings and orders in England and in Scotland, to which it is not necessary to refer in detail, the Australasian Company were restrained from further prosecuting their action in Scotland, but without prejudice to the security, if any, upon the amounts payable by the Scotch shareholders in the Queensland Company in respect of the said calls which the Australasian Company had acquired by the proceedings taken by them in Scotland; and the official liquidator had received from the receiver, or had himself collected, and held on separate accounts, the amounts paid for the calls by the Scotch and English shareholders respectively, the receipts from the Scotch shareholders being about £24,730., which sums remained to be distributed among the parties entitled thereto. By proceedings in the winding-up in Queensland the amount due from the Queensland Company to the Australasian Investment Company had been ascertained at £12,660. The claim of the Union Bank had in like manner been ascertained at upwards of £74,000.; but it was admitted that, after allowing for securities held by them, their claim was reduced to, in round figures, £31,000.; and they asked for an order upon the official liquidator to transfer to them on account of this claim the sums he had thus received. The Australasian Company claimed on the other hand to be first paid thereout the £12,660. due to them, the balance only going to the liquidator.

The plaintiffs in the actions of Drake and others against the Queensland Company also asserted a claim to the funds in hand against both the Union Bank and the Australasian Company.

North, J. (on October 28 and 29, 1890), held that the debentures issued by the Queensland Company to the Union Bank created a valid charge on the unpaid calls on the shareholders in the Queensland Company, and that they consequently took precedence of the judgment debts.

As to the question whether the Australasian Company or the Union Bank had priority.

Sir Horace Davey, Q. C., Buckley, Q. C., and S. Dickinson, for the Union Bank.—The law of Scotland on the question now in dispute is not correctly stated in the affidavit of Mr. Blair filed on behalf of the Australasian Company; but in any event that law is irrelevant, for the law of Queensland, which is the same as the law of England,

is the governing law, being the law of the domicile of the Queensland Company, which is the creditor in respect of the calls. Hunter v. Potts, 4 Term Rep. 182; Sill v. Worswick, 1 H. Black. 665; Simpson v. Fogo, 1 Hem. & M. 195, 32 Law J. Rep. Chanc. 249; Colonial Bank v. Cady, 60 L. J. Ch. 131, Law Rep. 15 App. Cas. 267; and Story's Conflict of Laws, c. 9, § 374. The English law gives priority to the Union Bank, which had a good charge on the calls before the Australasian Company came into question. Eyre v. McDowell, 9 H. L. Cas. 619; In re General Horticultural Company, Limited, Ex parte Whitehouse, 55 Law J. Rep. Chanc. 608, Law Rep. 32 Ch. D. 512; and Badeley v. Consolidated Bank, 57 Law J. Rep. Chanc. 468, Law Rep. 34 Ch. D. 536, 38 Ch. D. 238.

Crackanthorpe, Q. C., and Rawlins, for the Australasian Company.—The law of Scotland ought to govern this case, seeing that these are Scotch calls and that the necessary steps to secure a charge on these calls have been taken in Scotland. What the Scotch law is, is proved by the uncontradicted evidence of Mr. Blair, and this by virtue of the arrestment duly intimated to the Scotch shareholders, gives priority to the Australasian Company. Arden v. Arden, 54 Law J. Rep. Chanc. 655, Law Rep. 29 Ch. D. 702.

Everitt, Q. C., and Swinfen Eady, for the judgment creditors.

Cozens-Hardy, Q. C., and Kenyon Parker, for the liquidator.

Buckley, Q. C., in reply.

Judgment reserved.

North, J. (on January 14, 1891), after stating the facts as herein set forth, continued as follows: It is obvious that the charges created by the debentures and by the Scotch arrestment are both to be preferred to any claim by the mere judgment creditors in England of the Queensland Company, and I so decided on the hearing. The claim of the Australasian Company is founded upon the proposition that by the law of Scotland debts are assignable, and that an assignment of a debt is not complete or operative until notice or, as it is called, "intimation" thereof is given to the debtor, and that no such intimation of the Union Bank debentures was ever given before the Australasian Company had arrested the calls in question. The position of the company is stated in Mr. Blair's affidavit. [His Lordship here read several passages from this affidavit, and continued:]

It is not satisfactory to find that the only evidence in this case of the Scotch law is contained in an affidavit of Mr. Blair, the legal adviser of the Australasian Company, and that although there is no evidence contradicting it, the Union Bank state that they will, if necessary, contend before the House of Lords that such affidavit lays down the Scotch law incorrectly. This may be open before their Lordships on appeal, but it is not open before me, for the question of Scotch law is here merely a question of fact, upon which the evidence is all one way; and the Union Bank have not asked me to give them any opportunity of going into further evidence, or to send a

case for the opinion of the Scotch court. By such evidence it is established that there is, by virtue of the arrestment, what is equivalent to an actual assignment of the calls in question duly intimated, and that this, by the law of Scotland, is preferable to, and has priority over, the assignment to the Union Bank, of which, though prior in time to the arrestment, no intimation had been given at the date when the assignment by arrestment became complete; and this is what I feel bound to decide. It was contended on behalf of the Union Bank that the claim of the Australasian Company could only be valid as against "the sums attached," which were said to be what would remain of the calls after satisfying what was due to the Union Bank; but this is quite inconsistent with the language of the arrestment, which applies specifically to the whole sum due for calls from each of the shareholders on whom the arrestment is served. It was also stated that after the assignment to the Union Bank all that the Queensland Company had left was the surplus remaining over after paying the bank, that the rest of the calls belonged to the bank, and that it was contrary to principle and authority to hold that a process of law against the debtors could affect what was the property of the creditor, the Union Bank. But in the present case I have not to deal with a mere process of law such as a judgment or garnishee order, but with what is established as a fact to be equivalent to an actual assignment, and which, on the evidence, I must treat in exactly the same way as if such an assignment had been actually executed and intimated.

But the Union Bank also put their claim to priority over the Australasian Company in another way. They say that, whatever the position of matters might have been if all the parties to these transactions had been domiciled in Scotland, the facts are not so; the Queensland Company was a creditor in respect of the debts due from the shareholders for calls; that company was domiciled in Queensland, and, therefore, the validity of the assignments by them to the Union Bank depends upon the law of Queensland, and not on the law of the Scotch debtor's residence; that by the law of Queensland (which is admitted to agree with that of England) no "intimation" was necessary, and that a transfer of personal or movable property, valid by the law of the owner's domicile, is valid wherever the property may be situate. They rely upon the principle concisely expressed in the maxim "Mobilia sequuntur personam," and more fully stated in numerous authorities, of which it is sufficient that I should refer to one—namely, the judgment of Lord Loughborough in Sill v. Worswock, 1 H. Black. 665. He there says: "It is a clear proposition, not only of the law of England, but of every country in the world where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner. With respect to the disposition of it, with

respect to the transmission of it, either by succession or the act of the party, it follows the law of the person. The owner in any country may dispose of personal property. If he dies, it is not the law of the country in which the property is, but the law of the country of which he was a subject that will regulate the succession."

In my view, after full consideration, it is not now necessary for me to express any opinion upon this interesting and difficult question; for, assuming the principle above stated to include such a case as the present, there is another equally well known rule of law—namely, that a transfer of movable property duly carried out according to the law of the place where the property is situated, is not rendered ineffectual by shewing that such transfer was not in accordance with what would be required by law in the country where its owner is domiciled. To give an instance, according to Scotch law it is necessary, in order to create a charge on corporeal movables, that they should be delivered to, and placed in the possession of, the creditor. But if a domiciled Scotchman, resident in London, gave a duly registered bill of sale of the furniture of his house, this would be a complete and effectual transfer of the property without its being delivered to the creditor, notwithstanding that such a disposition of furniture in Scotland would have been ineffectual without delivery. To apply this to the present case, the Queensland Company did certain acts of commission or omission, by virtue of which certain legal rights arose in Scotland, having identically the same effect in all respects (according to the evidence before me) as if the Queensland Company had, on the date of the arrestment, executed an assignment of these calls in question to the Australasian Company, and such assignment had been forthwith intimated to the persons in whose hands the calls were arrested. Such an assignment would, according to the evidence, clearly have been preferred to another assignment, bearing, indeed, an earlier date, but not yet completed by intimation; and, in my opinion, the right of those who have acquired an unexceptionable title to, and have recovered, the property according to the law of the country where it is found and arrested, cannot be defeated by shewing that if the property had been elsewhere, the title of the Union Bank might have been the preferable one. I speak of the Australasian Company as having recovered the calls, although they have, as a matter of convenience, been received by the official liquidator, because they would actually have received them if the action had not been stayed, and the rights of the parties cannot be affected by the court having stayed the action, as, by the order staying it, their right or security was expressly left unprejudiced.

The terms of the order will require some care in dealing with figures, but in substance I accede to the summons of the Australasian Company, and only direct the payment of the balance of the proceeds of the Scotch calls to the Union Bank. There will be one order on both summonses, and the Australasian Company and the Union

Bank will add their costs to their respective securities. The official liquidator's costs must be retained by him out of the calls he has received.[28]

McSHANE v. KNOX.

(Supreme Court of Minnesota, 1908. 103 Minn. 268, 114 N. W. 955.)

BROWN, J. This action was brought by plaintiff, a resident of North Dakota, against defendant, also a resident of that state, to recover upon a promissory note theretofore executed by him to one Ellis, and by Ellis transferred to plaintiff. At the time of its commencement a garnishee summons was duly issued therein against the Northern Pacific Railway Company, a corporation organized under the laws of Wisconsin, but maintaining an agency and doing business in this state. The summons in the principal action was personally served upon the defendant in the city of Moorhead, this state, on June 17, 1907, together with a copy of the garnishee summons, with the usual notice to defendant and proof of service upon the garnishee. The garnishee disclosed an indebtedness to defendant in the sum of $140.10. Defendant made no appearance in the action, and on July 9, 1907, default judgment was rendered against him for the sum of $124.67. Thereafter application was made to the court for judgment against the garnishee upon its disclosure, on which defendant appeared specially and for the purposes of the motion only, and moved the court to dismiss the garnishment proceedings on the ground that, as all the parties were nonresidents of the state, the court had no jurisdiction. The motion was granted, and plaintiff appealed.

It is contended by defendant, in support of the order appealed from, that the case comes within the rule of Swedish-American Bank v. Bleecker, 72 Minn. 383, 75 N. W. 740, 42 L. R. A. 283, 71 Am. St.

[28] See 20 Harv. Law Rev. 637; 22 Am. & Eng. Encyc. (2d Ed.) 1343; 4 Cyc. 63; Dicey, Conflict of Laws, 522–525; Westlake, Priv. Int. Law, 196–198; Foote, Priv. Int. Jurispr. 261–264; Minor, Conflict of Laws, § 122; Story, Conflict of Laws, §§ 395–399. As to assignment of an insurance policy, see 63 L. R. A. 858–861.

CONTINENTAL LAW.—As between the assignor and assignee, the assignment of a debt is governed by the ordinary principles relating to contracts. *Germany*, R. G. Jan. 29, 1901 (12 Niemeyer, 113); O. L. G. Frankfurt (on the Main), March 4, 1892 (21 Clunet, 150); R. G. Dec. 3, 1891 (2 Niemeyer, 162). *Italy*, Cass. Rome, Nov. 7, 1894 (S. 1895, 4, 13); App. Venice, March 12, 1903, Annali 1903, 2, 261). But as to third parties and the debtor himself, the lex domicilii of the debtor or the lex solutionis of his obligation controls. *Germany*, 14 R. G. 235 (Nov. 13, 1885); 39 R. G. 371 (March 23, 1897); R. G. March 19, 1907 (18 Niemeyer, 174); O. L. G. Hamburg, Dec. 15, 1900 (56 Seuffert's Archiv, 260); O. L. G. Hamm, Jan. 29, 1906 (34 Clunet, 775); R. G. June 2, 1908 (18 Niemeyer, 449). For a contrary holding with regard to the case last cited, see *France*, Trib. Civ. Seine, Mch. 15, 1907 (4 Darras, 182). *Italy*, Cass. Rome, Nov. 7, 1894 (S. 1895, 4, 13).

See, also, F. Surville, La cession et la mise en gage des créances en droit international privé, 24 Clunet, 671–689.

Rep. 492, and McKinney v. Mills, 80 Minn. 478, 83 N. W. 452, 81 Am. St. Rep. 278, and should be affirmed, for the reason that all the parties—plaintiff, defendant, and garnishee—are nonresidents of this state; that the indebtedness sought to be reached by the garnishee proceedings was not payable in this state, but in North Dakota, where defendant was in the employ of the railway company, and did not arise out of a transaction occurring in this state; hence that the court had no jurisdiction. The contention is not sound. The cases referred to are not here in point. Much has been said and written on the subject of the jurisdiction of the courts in garnishment proceedings against nonresident parties, particularly in actions where the property sought to be reached is in the form of an indebtedness due the defendant from the garnishee. Many of the courts maintain with plausible argument that for the purposes of garnishment the situs of intangible property, such as debts, is at the domicile of the debtor, and may be attached wherever he may be found, whether in the state of his actual residence or elsewhere; while other courts of equal prominence, and with equal force and earnestness, insist that the debt has its situs with the creditor, and cannot be reached by garnishment proceedings, except in the state of his residence. The authorities are collected and reviewed in a note to Goodwin v. Claytor, 137 N. C. 224, 49 S. E. 173, 67 L. R. A. 209, 107 Am. St. Rep. 479; 7 Current Law, 1868. It is unnecessary to review them in this case, for the question is not here presented. They are all cases where no personal service of the summons was made upon the principal defendant in the state where the action was brought, and were actions or proceedings in rem, pure and simple. In actions of that nature, the jurisdiction of the court extends only to the res, the money or property in the hands of the garnishee, and the court has no authority to proceed unless the subject-matter, by proper service of process, is brought within the control of the court. But we have found no case wherein it has been held that the court is without jurisdiction, though it appear that all the parties are nonresidents of the state, where the summons was personally served upon the principal defendant, as well as upon the garnishee, in the state where the action was brought. In the case at bar, while the nonresidence of the parties is conceded, it appears that both the summons in the principal action and also the garnishee summons, with notice to defendant, were personally served upon defendant while within the state, and, further, that the garnishee, a Wisconsin corporation, is permanently engaged in conducting its business in this state, with an agency herein, and that the garnishee summons was served upon it in the manner required by law. Such facts take the case without the rule of any of the cases referred to. The jurisdiction of the court in a case where personal service is had within the state is not, strictly speaking, in rem, but in personam, and whether the situs of the debt be with the creditor, at his domicile, or with the debtor, the debt in question in this action had a situs in this state within all of the decisions; for both creditor and

debtor were found within the borders thereof, and were therein personally served with process in the action. There can be no doubt of the full and complete jurisdiction of the court in such case. Commercial Bank of Chicago v. Chicago, M. & St. P. Ry. Co., 45 Wis. 172; East Tennessee, V. & G. Ry. Co. v. Kennedy, 83 Ala. 462, 3 South. 852, 3 Am. St. Rep. 755; Louisville & N. Ry. Co. v. Nash, 118 Ala. 477, 23 South. 825, 41 L. R. A. 331, 72 Am. St. Rep. 181; Young v. Ross, 31 N. H. 201; Harris v. Balk, 198 U. S. 215, 25 Sup. Ct. 625, 49 L. Ed. 1023; Louisville & N. Ry. Co. v. Deer, 200 U. S. 176, 26 Sup. Ct. 207, 50 L. Ed. 426; 1 Shinn on Garnishment, § 5.

There is no suggestion that defendant was fraudulently induced to come within the state, to the end that the summons might be personally served upon him; and the rule laid down in Chubbuck v. Cleveland, 37 Minn. 466, 35 N. W. 362, 5 Am. St. Rep. 864, does not apply. The place of payment of the debt, if it be conceded that it sufficiently appears in this case that it was payable in North Dakota, is not important; for the garnishee makes no claim that it cannot be compelled to make payment elsewhere than at the place agreed upon with the creditor. Krafve v. Roy & Roy, 98 Minn. 142, 107 N. W. 966, 116 Am. St. Rep. 346; Harvey v. Great Northern Ry. Co., 50 Minn. 405, 52 N. W. 905, 17 L. R. A. 84. Nor is it material that plaintiff is a nonresident of this state. He had an undoubted right to bring his action in the courts of this state, under the clause of the federal Constitution guaranteeing to the citizens of each state all the rights and privileges of citizens of the several states. 1 Shinn on Garnishment, § 76. The statement in McKinney v. Mills, supra, that garnishment proceedings should in all cases be dismissed where it appears that all the parties are nonresidents of the state, was not intended to apply to cases where personal service was made upon both defendant and garnishee within the state. The learned trial court apparently relied upon the language of that decision in dismissing the proceedings; but there was no personal service in that case, and the proceeding was one strictly in rem. In the case at bar there was personal service both upon defendant and the garnishee, and the case referred to is not in point.

The order appealed from is reversed.

HARRIS v. BALK.

(Supreme Court of the United States, 1905. 198 U. S. 215, 25 Sup. Ct. 625, 49 L. Ed. 1023.)

Statement by Mr. Justice PECKHAM:

The plaintiff in error brings the case here in order to review the judgment of the Supreme Court of North Carolina, affirming a judgment of a lower court against him for $180, with interest, as stated therein. The case has been several times before the Supreme Court of that state, and is reported in Balk v. Harris, 122 N. C. 64, 30 S. E.

318, 45 L. R. A. 257, and in 124 N. C. 467, 32 S. E. 799, 45 L. R. A. 257, 70 Am. St. Rep. 606. The opinion delivered at the time of entering the judgment now under review is to be found in 130 N. C. 381, 41 S. E. 940. See, also, 132 N. C. 10, 43 S. E. 477.

The facts are as follows: The plaintiff in error, Harris, was a resident of North Carolina at the time of the commencement of this action, in 1896, and prior to that time was indebted to the defendant in error, Balk, also a resident of North Carolina, in the sum of $180, for money borrowed from Balk by Harris during the year 1896, which Harris verbally promised to repay, but there was no written evidence of the obligation. During the year above mentioned one Jacob Epstein, a resident of Baltimore, in the state of Maryland, asserted that Balk was indebted to him in the sum of over $300. In August, 1896, Harris visited Baltimore for the purpose of purchasing merchandise, and while he was in that city temporarily on August 6, 1896, Epstein caused to be issued out of a proper court in Baltimore a foreign or nonresident writ of attachment against Balk, attaching the debt due Balk from Harris, which writ the sheriff at Baltimore laid in the hands of Harris, with a summons to appear in the court at a day named. With that attachment, a writ of summons and a short declaration against Balk (as provided by the Maryland statute) were also delivered to the sheriff, and by him set up at the courthouse door, as required by the law of Maryland. Before the return day of the attachment writ Harris left Baltimore, and returned to his home in North Carolina. He did not contest the garnishee process, which was issued to garnish the debt which Harris owed Balk. After his return Harris made an affidavit on August 11, 1896, that he owed Balk $180, and stated that the amount had been attached by Epstein, of Baltimore, and by his counsel in the Maryland proceeding Harris consented therein to an order of condemnation against him as such garnishee for $180, the amount of his debt to Balk. Judgment was thereafter entered against the garnishee, and in favor of the plaintiff, Epstein, for $180. After the entry of the garnishee judgment, condemning the $180 in the hands of the garnishee, Harris paid the amount of the judgment to one Warren, an attorney of Epstein, residing in North Carolina. On August 11, 1896, Balk commenced an action against Harris before a justice of the peace in North Carolina, to recover the $180 which he averred Harris owed him. The plaintiff in error, by way of answer to the suit, pleaded in bar the recovery of the Maryland judgment and his payment thereof, and contended that it was conclusive against the defendant in error in this action, because that judgment was a valid judgment in Maryland, and was therefore entitled to full faith and credit in the courts of North Carolina. This contention was not allowed by the trial court, and judgment was accordingly entered against Harris for the amount of his indebtedness to Balk, and that judgment was affirmed by the Supreme Court of North Carolina. The ground of such judgment was that the Maryland court obtained no jurisdiction to at-

tach or garnish the debt due from Harris to Balk, because Harris was but temporarily in the state, and the situs of the debt was in North Carolina.

PECKHAM, J. The state court of North Carolina has refused to give any effect in this action to the Maryland judgment; and the federal question is whether it did not thereby refuse the full faith and credit to such judgment which is required by the federal Constitution. If the Maryland court had jurisdiction to award it, the judgment is valid and entitled to the same full faith and credit in North Carolina that it has in Maryland as a valid domestic judgment.

The defendant in error contends that the Maryland court obtained no jurisdiction to award the judgment of condemnation, because the garnishee, although at the time in the state of Maryland, and personally served with process therein, was a nonresident of that state, only casually or temporarily within its boundaries; that the situs of the debt due from Harris, the garnishee, to the defendant in error herein, was in North Carolina, and did not accompany Harris to Maryland; that, consequently Harris, though within the state of Maryland, had not possession of any property of Balk, and the Maryland state court therefore obtained no jurisdiction over any property of Balk in the attachment proceedings, and the consent of Harris to the entry of the judgment was immaterial. The plaintiff in error, on the contrary, insists that, though the garnishee were but temporarily in Maryland, yet the laws of that state provide for an attachment of this nature if the debtor, the garnishee, is found in the state, and the court obtains jurisdiction over him by the service of process therein; that the judgment, condemning the debt from Harris to Balk, was a valid judgment, provided Balk could himself have sued Harris for the debt in Maryland. This, it is asserted, he could have done, and the judgment was therefore entitled to full faith and credit in the courts of North Carolina.

The cases holding that the state court obtains no jurisdiction over the garnishee if he be but temporarily within the state proceed upon the theory that the situs of the debt is at the domicile either of the creditor or of the debtor, and that it does not follow the debtor in his casual or temporary journey into another state, and the garnishee has no possession of any property or credit of the principal debtor in the foreign state.

We regard the contention of the plaintiff in error as the correct one. The authorities in the various state courts upon this question are not at all in harmony. They have been collected by counsel, and will be found in their respective briefs, and it is not necessary to here enlarge upon them.

Attachment is the creature of the local law; that is, unless there is a law of the state providing for and permitting the attachment, it cannot be levied there. If there be a law of the state providing for the attachment of the debt, then, if the garnishee be found in that state, and process be personally served upon him therein, we think the court

thereby acquires jurisdiction over him, and can garnish the debt due from him to the debtor of the plaintiff, and condemn it, provided the garnishee could himself be sued by his creditor in that state. We do not see how the question of jurisdiction vel non can properly be made to depend upon the so-called original situs of the debt, or upon the character of the stay of the garnishee, whether temporary or permanent, in the state where the attachment is issued. Power over the person of the garnishee confers jurisdiction on the courts of the state where the writ issues. Blackstone v. Miller, 188 U. S. 189–206, 23 Sup. Ct. 277, 47 L. Ed. 439–445. If, while temporarily there, his creditor might sue him there and recover the debt, then he is liable to process of garnishment, no matter where the situs of the debt was originally. We do not see the materiality of the expression "situs of the debt," when used in connection with attachment proceedings. If by situs is meant the place of the creation of the debt, that fact is immaterial. If it be meant that the obligation to pay the debt can only be enforced at the situs thus fixed, we think it plainly untrue. The obligation of the debtor to pay his debt clings to and accompanies him wherever he goes. He is as much bound to pay his debt in a foreign state when therein sued upon his obligation by his creditor, as he was in the state where the debt was contracted. We speak of ordinary debts, such as the one in this case. It would be no defense to such suit for the debtor to plead that he was only in the foreign state casually or temporarily. His obligation to pay would be the same whether he was there in that way or with an intention to remain. It is nothing but the obligation to pay which is garnished or attached. This obligation can be enforced by the courts of the foreign state after personal service of process therein, just as well as by the courts of the domicile of the debtor. If the debtor leave the foreign state without appearing, a judgment by default may be entered, upon which execution may issue, or the judgment may be sued upon in any other state where the debtor might be found. In such case the situs is unimportant. It is not a question of possession in the foreign state, for possession cannot be taken of a debt or of the obligation to pay it, as tangible property might be taken possession of. Notice to the debtor (garnishee) of the commencement of the suit, and notice not to pay to his creditor, is all that can be given, whether the garnishee be a mere casual and temporary comer, or a resident of the state where the attachment is laid. His obligation to pay to his creditor is thereby arrested, and a lien created upon the debt itself. Cahoon v. Morgan, 38 Vt. 234, 236; National Fire Ins. Co. v. Chambers, 53 N. J. Eq. 468, 483, 32 Atl. 663. We can see no reason why the attachment could not be thus laid, provided the creditor of the garnishee could himself sue in that state, and its laws permitted the attachment.

There can be no doubt that Balk, as a citizen of the state of North Carolina, had the right to sue Harris in Maryland to recover the debt which Harris owed him. Being a citizen of North Carolina, he was

entitled to all the privileges and immunities of citizens of the several states, one of which is the right to institute actions in the courts of another state. The law of Maryland provides for the attachment of credits in a case like this. See sections 8 and 10 of article 9 of the Code of Public General Laws of Maryland, which provide that, upon the proper facts being shown (as stated in the article), the attachment may be sued out against lands, tenements, goods, and credits of the debtor. Section 10 particularly provides that "any kind of property or credits belonging to the defendant, in the plaintiff's own hands, or in the hands of any one else, may be attached; and credits may be attached which shall not then be due." Sections 11, 12, and 13 of the above-mentioned article provide the general practice for levying the attachment, and the proceedings subsequent thereto. Where money or credits are attached, the inchoate lien attaches to the fund or credits when the attachment is laid in the hands of the garnishee, and the judgment condemning the amount in his hands becomes a personal judgment against him. Buschman v. Hanna, 72 Md. 1, 5, 6, 18 Atl. 962. Section 34 of the same Maryland Code provides also that this judgment of condemnation against the garnishee, or payment by him of such judgment, is pleadable in bar to an action brought against him by the defendant in the attachment suit for or concerning the property or credits so condemned.

It thus appears that Balk could have sued Harris in Maryland to recover his debt, notwithstanding the temporary character of Harris' stay there; it also appears that the municipal law of Maryland permits the debtor of the principal debtor to be garnished, and therefore if the court of the state where the garnishee is found obtains jurisdiction over him, through the service of process upon him within the state, then the judgment entered is a valid judgment. See Minor on Conflict of Laws, § 125, where the various theories regarding the subject are stated and many of the authorities cited. He there cites many cases to prove the correctness of the theory of the validity of the judgment where the municipal law permits the debtor to be garnished, although his being within the state is but temporary. See pages 289, 290. This is the doctrine which is also adopted in Morgan v. Neville, 74 Pa. 52, by the supreme court of Pennsylvania, per Agnew, J., in delivering the opinion of that court. The same principle is held in Wyeth Hardware & Mfg. Co. v. H. F. Lang & Co., 127 Mo. 242, 247, 29 S. W. 1010, 27 L. R. A. 651, 48 Am. St. Rep. 626, in Lancashire Ins. Co. v. Corbetts, 165 Ill. 592, 46 N. E. 631, 36 L. R. A. 640, 56 Am. St. Rep. 275, and in Harvey v. Great Northern R. Co., 50 Minn. 405, 406, 407, 52 N. W. 905, 17 L. R. A. 84; and to the same effect is Embree v. Hanna, 5 Johns. (N. Y.) 101; also Savin v. Bond, 57 Md. 228, where the court held that the attachment was properly served upon a party in the District of Columbia while he was temporarily there; that as his debt to the appellant was payable wherever he was found, and process had been served upon him in the District of Columbia, the Supreme Court of the District had unquestioned jurisdiction to render judgment, and

the same having been paid, there was no error in granting the prayer of the appellee that such judgment was conclusive. The case in 138 N. Y. 209, 33 N. E. 938, 20 L. R. A. 118, 34 Am. St. Rep. 448 (Douglass v. Phœnix Ins. Co.), is not contrary to this doctrine. The question there was not as to the temporary character of the presence of the garnishee in the state of Massachusetts, but, as the garnishee was a foreign corporation, it was held that it was not within the state of Massachusetts so as to be liable to attachment by the service upon an agent of the company within that state. The general principle laid down in Embree v. Hanna, 5 Johns. (N. Y.) 110, was recognized as correct. There are, as we have said, authorities to the contrary, and they cannot be reconciled.

It seems to us, however, that the principle decided in Chicago, R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. Ed. 1144, recognizes the jurisdiction, although in that case it appears that the presence of the garnishee was not merely a temporary one in the state where the process was served. In that case it was said: "'All debts are payable everywhere unless there be some special limitation or provision in respect to the payment; the rule being that debts, as such, have no locus or situs, but accompany the creditor everywhere, and authorize a demand upon the debtor everywhere.' 2 Parsons, Contracts, 8th ed. 702 [9th ed. 739]. The debt involved in the pending case had no 'special limitation or provision in respect to payment.' It was payable generally, and could have been sued on in Iowa, and therefore was attachable in Iowa. This is the principle and effect of the best considered cases—the inevitable effect from the nature of transitory actions and the purpose of foreign attachment laws, if we would enforce that purpose." The case recognizes the right of the creditor to sue in the state where the debtor may be found, even if but temporarily there; and upon that right is built the further right of the creditor to attach the debt owing by the garnishee to his creditor. The importance of the fact of the right of the original creditor to sue his debtor in the foreign state, as affecting the right of the creditor of that creditor to sue the debtor or garnishee, lies in the nature of the attachment proceeding. The plaintiff in such proceeding in the foreign state is able to sue out the attachment and attach the debt due from the garnishee to his (the garnishee's) creditor, because of the fact that the plaintiff is really, in such proceeding, a representative of the creditor of the garnishee, and therefore if such creditor himself had the right to commence suit to recover the debt in the foreign state, his representative has the same right, as representing him, and may garnish or attach the debt, provided the municipal law of the state where the attachment was sued out permits it.

It seems to us, therefore, that the judgment against Harris in Maryland, condemning the $180 which he owed to Balk, was a valid judgment, because the court had jurisdiction over the garnishee by personal service of process within the state of Maryland.

It ought to be and it is the object of courts to prevent the payment of any debt twice over. Thus, if Harris, owing a debt to Balk, paid it under a valid judgment against him, to Epstein, he certainly ought not to be compelled to pay it a second time, but should have the right to plead his payment under the Maryland judgment. It is objected, however, that the payment by Harris to Epstein was not under legal compulsion. Harris in truth owed the debt to Balk, which was attached by Epstein. He had, therefore, as we have seen, no defense to set up against the attachment of the debt. Jurisdiction over him personally had been obtained by the Maryland court. As he was absolutely without defense, there was no reason why he should not consent to a judgment impounding the debt, which judgment the plaintiff was legally entitled to, and which he could not prevent. There was no merely voluntary payment within the meaning of that phrase as applicable here.

But most rights may be lost by negligence, and if the garnishee were guilty of negligence in the attachment proceeding, to the damage of Balk, he ought not to be permitted to set up the judgment as a defense. Thus it is recognized as the duty of the garnishee to give notice to his own creditor, if he would protect himself, so that the creditor may have the opportunity to defend himself against the claim of the person suing out the attachment. This duty is affirmed in the case above cited of Morgan v. Neville, 74 Pa. 52, and is spoken of in Chicago, R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. Ed. 1144, although it is not therein actually decided to be necessary, because in that case notice was given and defense made. While the want of notification by the garnishee to his own creditor may have no effect upon the validity of the judgment against the garnishee (the proper publication being made by the plaintiff), we think it has and ought to have an effect upon the right of the garnishee to avail himself of the prior judgment and his payment thereunder. This notification by the garnishee is for the purpose of making sure that his creditor shall have an opportunity to defend the claim made against him in the attachment suit. Fair dealing requires this at the hands of the garnishee. In this case, while neither the defendant nor the garnishee appeared, the court, while condemning the credits attached, could not, by the terms of the Maryland statute, issue the writ of execution unless the plaintiff gave bond or sufficient security before the court awarding the execution, to make restitution of the money paid if the defendant should, at any time within a year and a day, appear in the action and show that the plaintiff's claim, or some part thereof, was not due to the plaintiff. The defendant in error, Balk, had notice of this attachment, certainly within a few days after the issuing thereof and the entry of judgment thereon, because he sued the plaintiff in error to recover his debt within a few days after his (Harris') return to North Carolina, in which suit the judgment in Maryland was set up by Harris as a plea in bar to Balk's claim. Balk, therefore, had an opportunity for a year and a

day after the entry of the judgment to litigate the question of his liability in the Maryland court, and to show that he did not owe the debt, or some part of it, as was claimed by Epstein. He, however, took no proceedings to that end, so far as the record shows, and the reason may be supposed to be that he could not successfully defend the claim, because he admitted in this case that he did, at the time of the attachment proceeding, owe Epstein some $344.

Generally, though, the failure on the part of the garnishee to give proper notice to his creditor of the levying of the attachment would be such a neglect of duty on the part of the garnishee which he owed to his creditor as would prevent his availing himself of the judgment in the attachment suit as a bar to the suit of his creditor against himself, which might therefore result in his being called upon to pay the debt twice.

The judgment of the Supreme Court of North Carolina must be reversed, and the cause remanded for further proceedings not inconsistent with the opinion of this court.[29]

Reversed.

HARLAN and DAY, JJ., dissented.

[29] The state courts are in great confusion on this subject. Some courts have maintained that the situs of a debt for the purpose of garnishment is at the domicile of the creditor. Louisville & N. R. Co. v. Nash, 118 Ala. 477, 23 South. 825, 41 L. R. A. 331, 72 Am. St. Rep. 181 (1898). But it has been held that a Legislature may constitutionally fix the situs of a debt for such purpose at the residence of the debtor. Harvey v. Thompson, 128 Ga. 147, 57 S. E. 104, 9 L. R. A. (N. S.) 765, 119 Am. St. Rep. 373 (1907). Other courts have allowed the attachment of the debt at the residence of the debtor upon the general ground that, so far as the remedy of the creditors of the payee of the debt is concerned, it has a situs there. Cross v. Brown, 19 R. I. 220, 33 Atl. 147 (1895); Bragg v. Gaynor, 85 Wis. 468, 55 N. W. 919, 21 L. R. A. 161 (1893). Others again have allowed such a garnishment wherever the debtor could be found or sued. Harvey v. Great Northern R. Co., 50 Minn. 405, 52 N. W. 905, 17 L. R. A. 84 (1892); Wyeth Hardware & Mfg. Co. v. H. F. Lang & Co., 127 Mo. 242, 29 S. W. 1010, 27 L. R. A. 651, 48 Am. St. Rep. 626 (1895). It has been held, also, that a debtor can be garnished only in the state where the debt is payable, provided it is also the place of residence of his creditor. American Cent. Ins. Co. v. Hettler, 37 Neb. 849, 56 N. W. 711, 40 Am. St. Rep. 522 (1893); Bullard v. Chaffee, 61 Neb. 83, 84 N. W. 604, 51 L. R. A. 715 (1900). See, in general, 19 L. R. A. 577–580; 67 L. R. A. 209–223; 8 Col. Law Rev. 325.

As to garnishment of foreign corporations, see 19 Cyc. 1331–1337; Louisville & N. R. Co. v. Deer, 200 U. S. 176, 26 Sup. Ct. 207, 50 L. Ed. 426 (1906); National Fire Ins. Co. v. Chambers, 53 N. J. Eq. 468, 32 Atl. 663 (1895); Lancashire Ins. Co. v. Corbetts, 165 Ill. 592, 46 N. E. 631, 36 L. R. A. 640, 56 Am. St. Rep. 275 (1897); Pennsylvania R. Co. v. Rogers, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178 (1903); Baltimore & O. R. Co. v. Allen, 58 W. Va. 388, 52 S. E. 465, 3 L. R. A. (N. S.) 608, 112 Am. St. Rep. 975 (1905).

As to attachment of shares of stock, see J. H. Beale, Jr., Foreign Corporations, § 376; also 55 L. R. A. 796–809.

TAXATION. Intangible property has a situs for the purpose of taxation at the domicile of the creditor. Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. Ed. 558 (1879). Capital may be taxed, however, in the state where it is employed, though the owner be a nonresident. New Orleans v. Stemple, 175 U. S. 309, 20 Sup. Ct. 110, 44 L. Ed. 174 (1899); Bristol v. Washington County, 177 U. S. 133, 20 Sup. Ct. 585, 44 L. Ed. 701 (1900); State Board of Assessors of Parish of Orleans v. Comptoir National D'Escompte, 191 U. S. 388, 24

Sup. Ct. 109, 48 L. Ed. 232 (1903); Metropolitan Life Ins. Co. v. New Orleans, 205 U. S. 395, 27 Sup. Ct. 499, 51 L. Ed. 853 (1907). But the mere presence of the instrument evidencing a debt does not confer authority to tax upon the state where it is found. Buck v. Beach, 206 U. S. 392, 27 Sup. Ct. 712, 51 L. Ed. 1106 (1907). Unless, perhaps, the debt is incorporated in a specialty. State Tax on Foreign-Held Bonds, 15 Wall. 300, 21 L. Ed. 179 (1872). But a mortgage securing notes held by a nonresident may be taxed at the situs of the realty. Savings & Loan Soc. v. Multnomah Co., 169 U. S. 421, 18 Sup. Ct. 392, 42 L. Ed. 803 (1898).

Shares of stock are taxable at the domicile of the stockholder. Dwight v. Mayor, etc., of City of Boston, 12 Allen (Mass.) 316, 90 Am. Dec. 149 (1866); Dyer v. Osborne, 11 R. I. 321, 23 Am. Rep. 460 (1876); Worth v. Commissioners of Ashe County, 90 N. C. 409 (1884). But in creating a corporation a state may, for the purpose of taxation, assign a situs to the stock at the domicile of such corporation. Tappan v. Merchants' Nat. Bank, 19 Wall. 490, 22 L. Ed. 189 (1873); Corry v. Baltimore, 196 U. S. 466, 25 Sup. Ct. 297, 49 L. Ed. 556 (1905).

A transfer or succession tax may be imposed on debts owed by citizens of a state to a nonresident. Blackstone v. Miller, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. Ed. 439 (1903). Or upon stock or bonds held by a nonresident in a domestic corporation. Matter of Bronson's Estate, 150 N. Y. 1, 44 N. E. 707, 34 L. R. A. 238, 55 Am. St. Rep. 632 (1896); Matter of Cooley's Estate, 186 N. Y. 220, 78 N. E. 939, 10 L. R. A. (N. S.) 1010 (1906).

A tax may be levied upon transfers inter vivos within the state of shares of stock held in a foreign corporation by a nonresident. People v. Reardon, 184 N. Y. 431, 77 N. E. 970, 8 L. R. A. (N. S.) 314, 112 Am. St. Rep. 628 (1906), affirmed 204 U. S. 152, 27 Sup. Ct. 188, 51 L. Ed. 415 (1907).

CHAPTER II.

OBLIGATIONS.

SECTION 1.—CONTRACTS.

I. In General.[1]

[1] As to jurisdiction to enforce foreign contracts, see 55 Am. St. Rep. 774–778. As to place where contract is made, see 55 Am. St. Rep. 44–55; 99 Am. Dec. 668–675.

The general rule is that a contract is deemed made in the state or country where the last act necessary to make it a binding agreement takes place. Supreme Lodge K. P. v. Meyer, 198 U. S. 508, 25 Sup. Ct. 754, 49 L. Ed. 1146 (1905); Haas v. Myers, 111 Ill. 421, 53 Am. Rep. 634 (1884); Born v. Home Ins. Co., 120 Iowa, 299, 94 N. W. 849 (1903); Emerson Co. v. Proctor, 97 Me. 360, 54 Atl. 849 (1903). A contract concluded by correspondence will, therefore, ordinarily be deemed to have been made at the place where the letter of acceptance was mailed or the telegram of acceptance was delivered for transmission. Perry v. Mount Hope Iron Co., 15 R. I. 380, 5 Atl. 632, 2 Am. St. Rep. 902 (1886); Emerson Co. v. Proctor, 97 Me. 360, 54 Atl. 849 (1903).

Continental Law.—*France.* According to the prevailing opinion, the contract is regarded as made at the place where the letter of acceptance is posted. App. Rouen, Feb. 28, 1874 (D. 1877, 2, 222); App. Rennes, Dec. 15, 1891 (19 Clunet, 912); App. Limoges, March 2, 1894 (D. 1895, 2, 257); App. Poitiers, Oct. 28, 1907 (4 Darras, 222). In favor of place where the letter of acceptance is received, App. Lyon, June 27, 1867 (D. 1867, 2, 193); App. Chambéry, June 8, 1878 (D. 1878, 2, 113). The Court of Cassation has held that the place where the contract is made is a question of fact, to be left to the determination of the trial judge. Cass. Aug. 6, 1867 (S. 1867, 1, 400); Cass. Dec. 1, 1875 (D. 1877, 1, 450).

Germany.—Notwithstanding the rule that a declaration of intention (Willenserklärung) requiring communication is not effective until it reaches the other party (section 130, Civ. Code), it seems to be held that a contract will be deemed made in the state where the offer is accepted. 62 R. G. 379 (Feb. 12, 1906); R. G. June 2, 1908 (18 Niemeyer, 449). See also, section 151, Civ. Code.

Italy.—Article 36, Com. Code, provides that a contract is not complete until notice of the acceptance reaches the offeror. If the offeror requests an immediate performance, however, or if the nature of the transaction is such that in accordance with general commercial usage an answer is not required, it will be deemed complete the moment the offeree has entered upon his performance. See Cass. Palermo, Feb. 17, 1900 (La Legge 1901, 1, 165); Cass. Turin, Dec. 30, 1892 (Monitore 1893, p. 389); Cass. Turin, Jan. 13, 1891 (Monitore 1891, p. 189). These rules apply also to civil contracts. Cass. Turin, Feb. 4, 1891 (Giurispr. Tor. 1891, p. 153); Cass. Rome, Feb. 1, 1892 (2 Riv. de Dir. Eccl. 606).

See, also, F. Surville, Des contrats par correspondance, notammant dans les rapports internationaux, 18 Clunet, 361–379.

MONTANA COAL & COKE CO. v. CINCINNATI COAL & COKE CO.

(Supreme Court of Ohio, 1904. 69 Ohio St. 351, 69 N. E. 613.)

On February 1, 1896, the defendant in error the Cincinnati Coal & Coke Company executed and delivered to the plaintiff in error, the Montana Coal & Coke Company, a promissory note, of which the following is a copy:

"$1,654.39. Cincinnati, Feb. 1, 1896.

"Ninety days after date the Cinti. Coal & Coke Co. promise to pay to the order of Montana Coal & Coke Co. sixteen hundred fifty-four and thirty-nine one-hundreth dollars, payable at Northern Bank, Covington, Ky., value received. A. Montgomery, Pres.

"L. Stock, Sec'y & Treas."

On the back of said note appear the following indorsements:

"A. Montgomery & Co. Marshall McDonald."

The consideration for the note was coal sold by the plaintiff in error to the defendant in error the Cincinnati Coal & Coke Company, prior to its date. The Cincinnati Coal & Coke Company, when the money was due, requested an extension of time for payment, and the plaintiff in error agreed to extend the time for payment, provided that the Cincinnati Coal & Coke Company would execute and deliver to the plaintiff a 90-day note, indorsed by A. Montgomery & Co. and Marshall McDonald. A. Montgomery & Co. did so indorse said note on the back thereof at Covington, Ky., prior to the delivery of the note to the plaintiff in error. The Cincinnati Coal & Coke Company thereupon sent said note to Marshall McDonald, at Pittsburg, Pa., and he there indorsed his name on the back of said note after the indorsement of A. Montgomery & Co., and returned the said note to the Cincinnati Coal & Coke Company, at Cincinnati, Ohio, after which the Cincinnati Coal & Coke Company delivered the note to the plaintiff in error, the Montana Coal & Coke Company, at Cincinnati, Ohio. The note, on default, was not protested, nor was notice of nonpayment given to Alexander Montgomery, the surviving partner of A. Montgomery & Co., nor to Marshall McDonald or his legal representatives. The note was never discounted or negotiated at any bank in the state of Kentucky. No suit was instituted to compel the Cincinnati Coal & Coke Company to pay the note in any court prior to this suit. Each of the circuit courts of the state of Kentucky, being courts of general jurisdiction in all actions at law, held a term subsequent to May 1, 1896, at which an action might have been brought by the plaintiff in error to recover any sum that might have been due upon the note set out in the petition. The plaintiff, the Montana Coal & Coke Company, has always been the owner and holder of the note

set forth in the petition. On the trial of this action in the court of common pleas of Hamilton county the court held upon these facts that the liability of Alexander Montgomery and Marshall McDonald was to be determined by the laws of the state of Kentucky, and that by the laws of that state said indorsers were to be regarded as assignors merely, and were released from all liability to the payee of the note in suit, because the payee had failed to prosecute the maker to insolvency at the next term of the circuit court in that state after the maturity of the note. The petition of the plaintiff in error was therefore dismissed as to Montgomery and McDonald, and this judgment was affirmed on error to the circuit court of Hamilton county.

DAVIS, J. This court has already committed itself to the doctrine that "a contract made in one state or country to be performed in another is governed by the laws of the latter, which determine its validity, obligation, and effect." Pittsburgh, C., C. & St. L. Ry. Co. v. Sheppard, 56 Ohio St. 68, 46 N. E. 61, 60 Am. St. Rep. 732; Kanaga v. Taylor, per Bowen, J., 7 Ohio St. 142, 70 Am. Dec. 62. This rule is so well established upon reason and authority that it requires no discussion here. The note which is the subject of controversy in this case was signed by one of the parties in Ohio, and before delivery by another in Kentucky and by another in Pennsylvania; but it was delivered to the agent of the payee in Ohio. The contract was within the control of the parties who are bound by it, and did not become effective until it was delivered. Therefore the loci contractus is Ohio. But the place of performance, the loci solutionis, is Kentucky, because the note is expressly made "payable at Northern Bank, Covington, Ky." The plaintiff in error insists that this stipulation binds only the principal debtor, the Cincinnati Coal & Coke Company which signed underneath the note and upon the face of it; and that the contract of the parties who signed in blank on the back of the note, although before its delivery, is like the engagement of an indorser, an independent contract which contains no stipulation as to the place of performance. Hence it is argued that as to these parties the case is controlled by the lex loci contractus; that is, the law of Ohio. From our point of view, Montgomery & Co. and McDonald were not indorsers in the regular way and in the course of business as the owners or holders of the note. All of the defendants were original parties to the note, having signed it before it came into the possession of the first owner, the payee. The facts are undisputed, and the obvious deduction therefrom is that the parties to the note at the time of its utterance all understood, and meant to be governed by, its terms; for at the time Montgomery & Co. and McDonald put their signatures on the back of the note the stipulation that the money should be "payable at Northern Bank, Covington, Ky.," was as much a part of the original contract as the promise to pay to the order of plaintiff the sum of money which is stated. There was, in short, no separate contract after the making of the note; but the note came to

the payee signed by all of the defendants, and with the place of performance distinctly expressed.

There was therefore no error in the judgments of the courts below, and the judgment of the circuit court is affirmed.[2]

SPRINGS v. SOUTHBOUND R. CO.

(Supreme Court of South Carolina, 1896. 46 S. C. 104, 24 S. E. 166.)

The plaintiffs were cotton buyers in South Carolina and as such shipped over the defendant's railroad to the city of Savannah, Ga., 171 bales of cotton, arriving at destination about February 28, 1893. The defendant stood the cotton bales up on the ends of the bales, exposed to the weather, from February 28, 1893, until the 23d of April, 1893, at which time they were shipped by the steamer D. H. Miller to the city of Baltimore, where they arrived on April 25, 1893. The cotton was sold to Albert G. Ober, of that city. When weighed by Albert R. Rhett, a public weigher of that city, the heads of bales were found to be wet with water. The plaintiffs sued the railroad company to recover from it the sum of $275.64, as injury to the 171 bales of cotton, which, they alleged, resulted to their property from their negligence and carelessness in exposing the cotton to the weather for nearly two months. The answer admitted the shipment over its road by the plaintiffs, but alleged that it observed due care of the cotton after it reached the city of Savannah.[3]

POPE, J.[4] * * * In the thirteenth exception it is alleged the circuit judge was in error when he charged the jury: "Did they [defendant] put it [the cotton] in a place of safety when it reached Savannah? Did they safely keep the cotton—preserve it? If they did not, they, under the laws of the state of Georgia, would be liable for any damage resulting." The presiding judge made this quotation from the Georgia case cited by appellant: "We think section 2044 of the Code dispenses with the notice in this case, and relieves the plaintiff from any error or liability as a common carrier after the transportation of the freight within the accustomed time, *a deposit of it in a place of safety*, and the *holding of it there ready for delivery, on demand.*" (Italics ours). Remembering that, as to delivery, the defendant as well as plaintiffs were bound by the laws of the state of Georgia, where the delivery was had, we can see no error on the part of the circuit judge, for it is in keeping with the requirements of the laws of Georgia on this subject. This ground of appeal is dismissed. * * *

[2] As to where the place of performance in general is deemed to be, see Minor, Conflict of Laws, 377, 378; Grant v. Healey, Fed. Cas. No. 5,696 (1839). Compare Ballister v. Hamilton, 3 La. Ann. 401 (1848).

[3] The facts have been taken from the opinion and have been slightly abridged.

[4] Only so much of the opinion is given as relates to the law governing delivery.

why contracted for in Eng? If offer made in Eng & acc. in U.S. then contract made in U.S.

BENNERS v. CLEMENS.

(Supreme Court of Pennsylvania, 1868. 58 Pa. 24.)

This was an amicable action of assumpsit to December term, 1866, in which John Clemens was plaintiff and Isaac R. Benners, survivor of the firm of Isaac R. Benners & Co., defendant. The claim was for a balance due by defendant on an invoice of fruit, contracted for in England and shipped to defendant to New York. The whole amount of the shipment was $2,967.85, which was reduced to $896.95 by quercitron bark shipped to plaintiff. The plaintiff claimed to recover this balance at gold prices with interest from December 17, 1863. The only question in the case was whether it was to be paid on that basis.

The verdict was for $1,456.65, the whole amount of the plaintiff's claim. The defendant took a writ of error.

THOMPSON, C. J. The debt sued for was a debt contracted in England, or rather the balance of a debt contracted and partially liquidated there by returns in quercitron bark. In the absence of any understanding to the contrary the balance was due and payable there. This being so, it was payable in the legal currency of the country, denominated pounds, shillings, and pence, and the representative of gold. Of course, as any payment obtained here would be payable in legal tender notes, the value of the gold in legal tenders, with interest, would be what in amount the judgment should be. The lex loci contractus must control in interpreting the contract. Allshouse v. Ramsay, 6 Whart. 331, 37 Am. Dec. 417; Watson v. Brewster, 1 Pa. 381, and authorities cited by the defendant in error. This view of the case is sufficient to affirm the judgment without reference to any question arising on our legal tender acts.

The judgment being right in amount is affirmed.[5]

[5]As to whether the amount recoverable is to be calculated by the real par, or by the nominal par, see Lee v. Wilcocks, 5 Serg. & R. 48 (1819); Scofield v. Day, 20 Johns. (N. Y.) 102 (1822); Adams v. Corlis, 8 Pick. (Mass.) 260 (1829); Grant v. Healey, Fed. Cas. No. 5,696 (1839); Marburg v. Marburg, 26 Md. 8, 90 Am. Dec. 84 (1866).

In Abt v. American Trust & Savings Bank, 159 Ill. 467, 470, 42 N. E. 856, 50 Am. St. Rep. 175 (1896), the point for determination was whether the Illinois law or the New York law should govern the question whether the drawing of a draft in Illinois on a New York bank operated as an assignment pro tanto of the funds on deposit. The court, per Carter, J., said: "The contract was to be performed in New York, and it must be presumed that upon a question of this character the parties contracted with reference to the laws of the state where the contract was to be performed, rather than with reference to the laws of the state where the contract was made." In Davis v. Adae, 7 Ohio Dec. 620 (1879), it was held, however, that as between the drawer of a check and the holder the lex loci contractus should govern. And in France the law of the place where a bill of exchange is drawn determines its effect upon the funds in the hands of the drawee. Cass. Feb. 6, 1900 (S. 1900, 1, 161), and note by Ch. Lyon-Caen. Such law has been held to apply also

GRAHAM v. FIRST NAT. BANK OF NORFOLK.

(Court of Appeals of New York, 1881. 84 N. Y. 393, 38 Am. Rep. 528.)

FINCH, J.[6] The ownership of one hundred and ninety-six shares of stock, which stood upon the books of the Norfolk Bank in the name of Eliza A. Graham, must be deemed vested in her, whether the purchase price was paid by her or by her husband, and notwithstanding the evident control of it, for his own purposes, by the latter. No creditors of the husband intervene to affect the question, and, as between Mrs. Graham and the bank, her right as owner must be admitted. The dividends declared during such ownership belonged to and were payable to her; and, assuming for the present that her assignment to plaintiffs was effective to transfer such right to them, there remain for discussion only the two questions: Whether the Norfolk Bank did, in fact, pay the dividends sued for to the husband of Mrs. Graham; and whether by such payment to him the liability of the bank to her was discharged. The referee has found that such payments were, in fact, made to James Graham, the husband. * * *

While the facts are not free from difficulty, a careful examination has satisfied us that there was sufficient evidence to warrant the finding of the referee, and to make it conclusive on this appeal.

The question of law, however, remains, whether the payment by the bank to James Graham was a good payment to his wife in whose name the stock stood upon the books of the bank. The Norfolk Bank was located and transacted business in the state of Virginia. It is proved that in that state the common law prevails as it respects the relation of husband and wife, and that within that jurisdiction the husband has the absolute right to reduce to his own possession, and use for his own benefit, the personal property of the wife. The contract out of which grew the right to the dividends was both made and to be performed in Virginia, and if the payment by the Bank of Norfolk to James Graham is to be tested and measured by the law of that state, it is conceded to have been good and an effective discharge of the liability to the wife. It is denied, however, that the law of Virginia applies, and it is argued that the law of Maryland, the lex domicilii, governs and controls the capacity of the parties to receive payment, and the duty of the bank in making it. The general subject of a conflict between the law of the domicile and that of the place of contract has been fully discussed by Story and Wharton in their respective treatises. Story on Conflict of Laws, § 374 et seq.; Wharton, § 393 et seq. Whatever is useful in

between an indorser and his indorsee. App. Caen, Dec. 12, 1900 (29 Clunet, 321). But see App. Rennes, Aug. 1, 1895 (23 Clunet, 376), in favor of the law of the place of indorsement.

[6] The statement of facts and a part of the opinion have been omitted.

the learning of the continental jurists, or the decisions of the English courts, has been made tributary to conclusions which we may safely follow where, at least, they are in harmony with the ruling of our own tribunals. It must, then, be granted that movables or personal property, by a fiction of the law, are deemed attached to the person of the owner, and so, present at his domicile, whatever their actual situation may be. The law of the domicile, therefore, naturally governs their transfer by the owner, and their disposition and distribution in case of his death. So far the authorities substantially agree, differing only in the reasons upon which the rule is founded, and by which it is to be justified. When, however, the question passes beyond the disposition of the personal property by the party, or the act of the law, within the jurisdiction of the domicile, and busies itself with the inherent character of the property, and of the contracts which both create and constitute it, elements of discord arise, and the authorities are not easily to be reconciled. It is readily seen that the inherent character of the contract must usually be the product of the jurisdiction in which it originates, and hence it follows, and has been justly held, that the construction, nature and effect of a contract are to be determined by the lex loci contractus. Story on Conflict of Laws, § 321. But no such question is here. There is no dispute about the construction of the contract to pay dividends. All are agreed upon that. There is no trouble as to the nature of the contract or its effect. Its validity, and the duty of payment to the stockholders, is conceded on all sides. The real question is over the performance of the contract, or its discharge by payment; and that involves the capacity of the husband to receive and discharge the debt, represented by the dividends, jure mariti. On the one hand it is argued that this question of capacity, of the rights and powers flowing from the marriage relation, is dependent upon the law of the domicile, and utterly unaffected by the foreign law, and the former must, therefore, dictate and measure the authority and power of the husband and the right of the wife. That is, in general, true as between themselves, and relatively to each other. It does not follow that it is true as between them and a debtor in another state, whose contract was made there, and is there to be performed. Such a fact introduces a new element into the problem. It would scarcely be endurable if a railroad or insurance company declaring dividends in this state should be bound to pay stockholders in other states according to the foreign laws, and in accordance with different and varying Codes. Observing the evil result we must remember that, in a case like the present, it is a legal fiction which attaches the property to the domicile, and the actual fact may be otherwise. Judge Comstock, in People ex rel. Hoyt v. Commissioners of Taxes, 23 N. Y. 228, well says, "that the fiction or maxim, 'Mobilia personam sequuntur,' is by no means of universal application. Like other fictions it has its special uses. It may be resorted to when convenience and justice so require. In other circumstances the truth and not the fiction affords, as it plainly ought to

afford, the rule of action." And Judge Story says that the legal fiction "yields whenever it is necessary for the purposes of justice, that the actual situs of the thing should be examined." Confl. of Laws, § 550. And hence has been very steadily sustained the general rule that a contract made in one state and to be performed there is governed by the law of that state, and the further rule, which is a logical result, that a defense or discharge, good by the law of the place where the contract is made or to be performed, is to be held, in most cases, of equal validity elsewhere. Story on Confl. of Laws, § 331; Thompson v. Ketchum, 8 Johns. 189, 5 Am. Dec. 332; Bartsch v. Atwater, 1 Conn. 409; Smith v. Smith, 2 Johns. 235, 3 Am. Dec. 410; Hicks v. Brown, 12 Johns. 142; Sherrill v. Hopkins, 1 Cow. 103; Peck v. Hibbard, 26 Vt. 702, 62 Am. Dec. 605; Bowen v. Newell, 13 N. Y. 290, 64 Am. Dec. 550; Cutler v. Wright, 22 N. Y. 472; Waldron v. Ritchings, 3 Daly, 288; Jewell v. Wright, 30 N. Y. 259, 86 Am. Dec. 372; Willitts v. Waite, 25 N. Y. 577. In these cases the fiction yields to the fact; the situs attached theoretically to the person of the owner, and, therefore, to his domicile, surrenders to the actual situs where justice and convenience demand it. The illustrations are various, but founded upon a common reason and justification. For the purpose of taxation the actual situs controls and the fiction which carries the personal property to the domicile of the owner is disregarded. As to days of grace affecting the maturity of a contract and determining when it becomes due, the lex loci is applied. The defense of infancy is to be sustained or denied according to the rule of the place of contract and performance. So, also, as to the disability of coverture, and the rate and legality of interest. And even an assignment, in invitum, compelled by the local law, will transfer property in another state where suitors in the courts of the latter are not thereby prejudiced. These rulings and others of the like character have been modified and moulded in their application by the influence of varied circumstances, but concur in the general principle upon which the lex loci has been applied. The point pressed here is that while it controls the construction and validity of the contract it does not settle the capacity of the nonresident parties. But to found a ruling upon such a test would involve us in an ambiguity. Capacity may affect the power of transfer and the direction and details of distribution. In that respect it is often shaped and settled by the law of the domicile. But it also affects the validity of a contract and the mode and manner of its dissolution or discharge. In that respect it is generally governed by the law of the place of contract. Story concludes, after a full and learned review of the insuperable difficulties which attend an effort to extend the capacity or incapacity created by the law of the place of domicile to foreign states, that the true rule is that "the capacity, state and condition of persons according to the law of their domicile will generally be regarded as to acts done, rights acquired and contracts made in the place of their domicile, touching property situate therein," but as to acts done, etc., elsewhere the lex loci contractus will

govern in respect to capacity and condition. We cannot make, therefore, the law of the domicile in and of itself a solvent of the doubts and difficulties likely to arise even as to questions of capacity. In the present case the contract was made in Virginia and to be performed there. The dividends were there declared and payable. They were paid to the husband who could lawfully receive and appropriate them, by the law of Virginia, to his own use and benefit. The payment was, therefore, valid and effectual and discharged the bank from its liability. The rights of the wife after such payment, as between herself and her husband under the law of Maryland, might prove to be a very different question. It is sufficient for the purpose of this case that the payment, which the referee finds was in fact made to the husband, discharged the liability of the bank and furnished a defense to the action.

The judgment should be affirmed with costs. All concur, except RAPALLO, J., absent.[7]

HEALY v. GORMAN.

(Supreme Court of New Jersey, 1836. 15 N. J. Law, 328.)

This was an action of assumpsit on a promissory note dated in the city of New York, and payable at the State Bank in Elizabethtown, New Jersey. The Chief Justice, on the trial at the circuit, directed the

[7] Where the further performance of a contract became impossible by reason of military operations at the place of performance, or by reason of prohibitive enactments by the local government of such place, the question whether the contract was discharged was held to be determined by the law governing the making of the contract, and not by that governing its performance. Jacobs v. Crédit Lyonnais, L. R. 12 Q. B. Div. 589 (1884); Tweedie Trading Co. v. James P. McDonald Co. (D. C.) 114 Fed. 985 (1902). In the latter Adams, District Judge, said: "Contracting parties are subject to the contingencies of changes in their own law, and liable to have the execution of their contracts prevented thereby; but it is on the ground of illegality, not of impossibility. Prevention by the law of a foreign country is not usually deemed an excuse, when the act which was contemplated by the contract was valid in view of the law of the place where it was made. Pol. Cont. 363; Abb. Shipp. (13th London Ed.) 755; Carv. Carr. by Sea (3d Ed.) § 255; Clifford v. Watts, L. R. 5 C. P. 577, 586; Duff v. Lawrence, 3 Johns. Cas. 162, 172; Spence v. Chadwick, 10 Q. B. 517, 530; Jacobs v. Crédit Lyonnais, 12 Q. B. Div. 589. And a fortiori when it was also then valid at the place of performance."

CONTINENTAL LAW.—a. *In general.*—There is general agreement that matters relating to the performance of an obligation should be subject to the lex solutionis. *France*, Trib. Com. Rouen, Dec. 10, 1899 (15 Autran, 442); Trib. Com. Marseille, Sept. 26, 1894 (25 Clunet, 749). *Germany*, 6 R. G. 125 (March 11, 1882); O. L. G. Hamburg, Oct. 31, 1900 (17 Autran, 163). *Italy*, article 10, Prel. Disp. Civ. Code; Cass. Naples, Dec. 4, 1892 (26 Clunet, 866); App. Catania, July 17, 1880 (Giurispr. Cat. 1880, p. 168).

b. *Interest and damages.*—Contractual interest is subject to the general rules governing contracts in the particular country. *France*, Cass. Feb. 19, 1890 (17 Clunet, 495); App. Bordeaux, Aug. 22, 1865 (S. 1866, 2, 217). *Italy*, article 9, Prel. Disp. Civ. Code. Moratory interest, on the other hand, is fixed by the lex solutionis. *France*, Cass. April 13, 1885 (S. 1886, 1, 154). *Germany*, 1 R. G. 59 (Feb. 20, 1880); 24 R. O. H. G. 388 (Dec. 6, 1878). *Italy*, Cass. Florence, July 4, 1892 (Temi Ven. 1892, p. 454).

jury to allow interest, at the rate of seven per cent., being the legal interest of the state of New York, where the plaintiff lived, and the contract was made. It was agreed by the counsel for the parties, that this question of the rate of interest should be moved, and argued at the bar of the court, and if the direction of the Chief Justice should be found wrong, then that the excess of interest should be deducted and judgment be entered for the residue.

HORNBLOWER, C. J. I am satisfied that I was wrong in directing the jury to allow interest at the rate of seven per cent., the legal interest in the state of New York, instead of New Jersey interest, which is only six per cent.

Mr. Justice Story in his Commentaries on Conflicting Laws, 241, § 291, says: "The general rule is, that interest is to be paid on contracts, according to the law of the place, where they are to be performed, in all cases where interest is expressly or impliedly to be paid." In support of this rule the commentator refers to a great number of cases, both American and English.

Chancellor Kent in his Commentaries (section 39, pp. 460, 461, 2d Ed.) says: "The law of the place where the contract is made, is to determine the rate of interest, when the contract specifically gives interest; and this will be the case though the loan be secured by a mortgage on lands in another state, unless there be circumstances to show that the parties had in view the law of the latter place in respect of interest; when that is the case, the rate of interest of the place of payment, is to govern."

The note in question though made in the city of New York was in express terms to be paid at the Bank of Elizabeth, in this state. The contract did not carry interest upon the face of it, but upon default of payment at the day and place, the law of this state tacitly annexes an obligation thenceforth to pay interest until the debt is liquidated. But the obligation to pay interest was no part of the contract; for if the contract had been performed, no interest could have been demanded. It may be said however, that it was; and that the understanding of the parties, and therefore in legal contemplation, a part of the New York contract, that if the money was not paid at maturity, it should then carry interest till paid. But the liability to pay interest, in such case is rather a legal consequence, than a conventional duty. The contract itself was for payment at a day certain. It did not contemplate a failure in the performance, and therefore made no provisions in anticipation of such an event; but left the law to take its course in case of a breach of the contract. Since, therefore, the event which gave rise to and legalizes the plaintiff's claim to interest, happened in this state; or in other words, since it was here that the right to interest accrued, and by operation of our law that it becomes payable, the rate of interest must be such as is allowed in this state. See Story on Conflicting Laws, 245, §§ 294, 295. The excess of interest must therefore be de-

ducted, and judgment entered for the residue, pursuant to the agreement of the parties entered into at the circuit.

FORD and RYERSON, JJ., concurred.

Judgment for 6 per cent. interest.[8]

CURTIS v. DELAWARE, L. & W. R. CO.

(Court of Appeals of New York, 1878. 74 N. Y. 116, 30 Am. Rep. 271.)

Appeal from judgment of the General Term of the Supreme Court, in the Second Judicial Department, affirming a judgment in favor of plaintiff, entered upon a decision of the court on trial, without a jury.

This action was brought to recover for the loss of a trunk and its contents. The court found, in substance, that plaintiff, on the 9th of October, 1875, took passage on defendant's road from Scranton, Pa., to New York City, leaving his baggage to be brought by his wife; that, on the 16th of October, 1875, plaintiff's wife and infant son took passage at Scranton for New York, with his and their baggage, consisting of personal clothing, all of which was his property; that the baggage was was brought safely by defendant to New York, and was there lost through its negligence.

That by a general act of the Legislature of said commonwealth of Pennsylvania, passed on the 11th day of April, 1867 (P. L. 69), and at all times since and still in force, it was enacted and declared as follows:

"Section 1. Each passenger upon a railroad shall have the right to have carried in the car or place provided for that purpose, in the train in which he or she may be a passenger, his or her personal clothing, not exceeding, inclusive of the trunk or box in which it may be contained, one hundred pounds in weight, and $300 in value.

"Sec. 2. No railroad company shall, under any circumstances, be liable for loss or damage of any baggage or property belonging to any such passenger, beyond the said sum of $300, unless it shall be proven that the excess in value thereof over that sum was duly declared to the agents of the company at the time of its delivery for transportation, and the sum charged by the railroad company for such transportation over and above passage fare was paid:

"Provided, however, that the said declaration shall not relieve the claimant from proving the actual value of the articles alleged to have been lost or damaged; but in no event shall there be any recovery beyond the value thus declared."

Further facts appear in the opinion.

MILLER, J.[9] The right of a passenger to recover of a railroad corporation damages arising by reason of a loss of baggage, while travel-

[8] As to contractual interest, see 62 L. R. A. 35–37; Minor, Conflict of Laws, § 184.

[9] A part of the opinion has been omitted.

ing upon the railroad, is fully established, and according to the laws of this state there can be no question as to the liability of such company for the loss actually sustained, when it fails to fulfill the contract with the traveler, or is chargeable with negligence, by which the damages are caused. The baggage, for which a recovery was had, was delivered to the defendant at Scranton, in the state of Pennsylvania, to be transported to and delivered in the city of New York. The first question which arises upon this appeal is whether the statute of the state of Pennsylvania passed in 1867, which limits and defines the liability of railroad corporations upon contracts entered into by them for the transmission of baggage, forms a part of the contract between the plaintiff and the defendant, and should be considered as determining the right to recover and the amount of the recovery. I think that the statute cited has no application, and that the rights of the parties must be determined in accordance with the laws of the state of New York, which are applicable to such contracts, as is manifest by referring to the principles which govern contracts of this description. One of the rules applicable to the subject is that the lex loci contractus is to govern, unless it appears upon the face of the contract that it was to be performed in some other place, or made with reference to the laws of some other place, and then the rule of interpretation is governed by the law of the place. Dyke v. Erie Ry. Co., 45 N. Y. 113, 6 Am. Rep. 43; Sherrill v. Hopkins, 1 Cow. 103. The place of delivery was a material and important part of the contract, and until such delivery the same was not completed and fulfilled. Upon a failure to deliver the baggage to the plaintiff, in the city of New York, there was a breach of the contract; and as the final place of performance was in that city, it would seem to follow that, within the rule laid down, the contract was to be governed, at least so far as a delivery is concerned, by the laws of New York. This certainly was to be done in a different place from where the contract was made, and it is a reasonable inference that it was in the contemplation of the parties at the time, and that it was entered into with reference to the laws of the place where it was to be delivered. So also, when it appears that the place of performance was different from the place of making the contract, it is to be construed according to the laws of the place where it is to be performed. Sherrill v. Hopkins, supra, p. 108, and authorities there cited; Thompson v. Ketchum, 8 Johns. 189, 5 Am. Dec. 332; 4 Kent's Com. 459. The place of final performance of the contract being in the city of New York, although the transportation was mostly through other states, no reason exists why a failure to deliver the baggage should not be controlled by the laws which prevail at the place of delivery. It is said that the contract is entire and indivisible, and we are referred to some cases outside of this state, which, it is claimed, sustain the doctrine that the locality where the contract was made, in cases of this character, must control. None of the cases cited are entirely similar to the one at bar and do not involve the precise point now considered.

But even were it otherwise, they are not, I think, controlling, as no reason exists why a contract to deliver baggage should not be governed by the laws of the place where the baggage is to be delivered. * * *[10]

In re MISSOURI S. S. CO.

(Court of Appeal, 1889. 42 Ch. D. 321, 58 L. J. Ch. 721.)

This was an action for damages, brought in England by A. N. Munroe, a citizen of the United States, residing at Boston, Mass., against the Missouri Steamship Company, Limited, which was in course of voluntary liquidation, for the loss of 264 head of cattle shipped by Munroe in America on board their ship, the Missouri.

The Missouri Steamship Company was an English company, having its offices at Liverpool, and the Missouri was an English ship. The cattle were shipped by Munroe under contracts in the English form, signed by the agents of the company at Boston. The contracts and bills of lading contained each a stipulation, relieving the carrier from liability for loss occasioned through the negligence of the master and crew.

The Missouri was wrecked on the coast of Carnarvon and the cattle were drowned. For the purpose of this claim it was admitted that the cargo was lost through the negligence of the master and crew.

Claimant contended that the contract should be governed by the law of Massachusetts, according to which any special contract exempting a common carrier from responsibility for the negligence of himself or his servants was null and void.

Chitty, J., held the stipulations valid, "First, on the general ground that the contracts are governed by the law of the flag, and, secondly, on the particular ground that from the special provisions of the contracts themselves it appears that the parties were contracting with a view to the law of England."

From this judgment the claimant appealed. The appeal came on to be heard on June 20, 1888, but the hearing stood over to await the decision of The Montana case in the Supreme Court of the United States. The case came on again on the 1st of May, 1889, when a printed copy of the judgment of The Montana case was produced to the court from which it appeared that the stipulation in question was held by the Supreme Court to be void as being contrary to public policy.[11]

FRY, L. J.[12] The principles on which this case has to be decided have

[10] Accord: Brown v. Camden & A. R. Co., 83 Pa. 316 (1877); Williams v. Central R. Co. of New Jersey, 93 App. Div. 582, 88 N. Y. Supp. 434 (1904), affirmed 183 N. Y. 518, 76 N. E. 1116 (1905).

[11] The statement of facts has been somewhat abridged.

[12] The opinion of Chitty, J., in the court below, and the concurring opinions of Lord Halsbury, L. C., and Cotton, L. J., have been omitted.

been familiar to the courts at any rate since the time of Lord Mansfield, who in the case of Robinson v. Bland, 2 Burr. 1077, expounded those principles of law, and they have been clearly stated since in many cases, among others in the well-known case of Lloyd v. Guibert, Law Rep. 1 Q. B. 115, 122, where the learned judge who delivered the judgment of the Exchequer Chamber, said: "It is, however, generally agreed that the law of the place where the contract is made, is prima facie that which the parties intended, or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention, as for instance"—and he goes on to enumerate instances from which the courts have gleaned a different intention. That view of the law was fully adopted in the case of Jacobs v. Crédit Lyonnais, 12 Q. B. D. 589, in this court.

I think, therefore, the general principle on which we have to proceed is one which admits of no doubt, and the inquiry, therefore, is this: Looking at the subject-matter of this contract, the place where it was made, the contracting parties, and the things to be done, what ought to be presumed to have been the intention of the contracting parties with regard to the law which was to govern this contract? By that I mean to determine its validity and its interpretation.

Now, in the first place, the ship was an English ship; the owners were an English company; England was the place to which the goods were to be brought and the place at which the final completion of the contract was to take place; and, what is still more important, the forms of the contract and the bills of lading were English forms. According to the law of England, the contract would be good in the terms in which it stood; whereas according to the law of the United States important terms of the contract would be excluded from it. That is, to my mind, a very cogent consideration to shew that what must be presumed to have been the intent of the parties was this: That the law which would make the contract valid in all particulars was the law to regulate the conduct of the parties. Looking at all the circumstances of the case, I have no doubt that that is the conclusion which we ought to arrive at.

In coming to that conclusion, and in stating those principles, I am glad to find that I am in entire accordance with the law laid down in the American courts. It appears to me that the passages cited from Mr. Justice Story are strong in favor of the principle to which I have referred, and in the case of The Montana that rule was adopted in express terms by the Supreme Court of the United States. Lord Justice Cotton has read one passage from that judgment, and I will read another: "This court has not heretofore had occasion to consider by what law contracts like those now before us should be expounded. But it has often affirmed and acted on the general rule, that contracts are to be governed, as to their nature, their validity, and their interpretation, by the law of the place where they were made, unless the con-

tracting parties clearly appear to have had some other law in view." And in that very case, in accordance with the principle so laid down, the Supreme Court proceeded to inquire whether there were any circumstances from which they ought to presume any other law than that of the place where the contract was made to have been presumed by the parties. Therefore, it is obvious in adopting the principles which I have stated we are proceeding not only according to the English law, but also according to the law of America. It is very desirable, if possible, that the law relating to the interchange of comity between nations should be the same.

There was only one other argument put forward to which I need refer, and it seemed to me to be a little halting between two statements. Sir Walter Phillimore laid down a proposition to this effect, that whenever the law of the place where the contract is made prohibits a particular stipulation in a contract no other country can treat that stipulation as valid. If by the word "prohibit" he means that the law of the United States has in terms prohibited or has rendered illegal or criminal the introduction of this stipulation, it appears to me that the decision in The Montana case shows that that is not the law of the United States. That decision I think, when fairly read, shews what one would expect to be the case, namely, that the courts have held that this stipulation being obnoxious to their public policy is void, not illegal, exactly in the same way as in this country we hold that stipulations which are in restraint of trade are not illegal, and that the entering into them does not constitute an illegal conspiracy, but they are void. If, on the other hand, it be argued that where the law of the place of the contract refuses to enforce a stipulation, then no other country will enforce that stipulation, we have a proposition which on the face of it appears to me to be untenable. Therefore, whichever is the alternative of the proposition which Sir Walter Phillimore adopts, neither of them will support his case.

I think, therefore, the decision of Mr. Justice Chitty was correct, and that this appeal fails.[13]

[13] See Hamlyn v. Talisker Distillery (H. L. Sc.), [1894] A. C. 202; Spurrier v. La Cloche, [1902] A. C. 446.

CONTINENTAL LAW.—*France.*—In the absence of an express stipulation or special circumstances showing a contrary intent, the law of the place where a contract is made will govern its substance and effect. Cass. Feb. 6, 1900 (S. 1900, 1, 161); Cass. Feb. 23, 1864 (S. 1864, 1, 385). *Germany.*—German courts apply the law of the place of performance. R. G. July 4, 1904 (15 Niemeyer, 285). [This rule has been applied to the determination of the validity of a clause not to engage in a similar business. R. G. March 22, 1904 (S. 1904, 4, 6). And to the question of usury. 46 R. G. 112 (May 26, 1900).] In favor of the lex domicilii of the debtor, see 61 R. G. 343 (Oct. 12, 1905). In the case of bilateral agreements, where the place of performance of one party is different from the place of performance of the other, the obligations of each party will be determined with reference to the lex solutionis of his own part of the agreement. 34 R. G. 191 (Oct. 13, 1894); 46 R. G. 193 (April 28, 1900); 51 R. G. 218 (April 21, 1902); 55 R. G. 105 (June 16, 1903); R. G. Apr. 26, 1907 (18 Niemeyer 177). Unless, in accordance with the presumed intention of the parties, a uniform law can be deemed applicable. R. G. April

CARNEGIE v. MORRISON.

(Supreme Judicial Court of Massachusetts, 1841. 2 Metc. 381.)

SHAW, C. J.[14] A case, involving most of the same questions which arise in the present, was argued at a former term; but, having stood over for consideration, the court have been desirous of hearing the argument in this case, before giving an opinion in the former one. It has now been fully and very ably argued on both sides. It involves questions of much difficulty, and of great importance to the mercantile community.

It is an action of assumpsit, brought by Carnegie & Co., a mercantile firm at Gottenburg, Sweden, against Messrs. Morrison, Cryder & Co. of London. The action is founded upon a letter of credit given by the defendants, by Mr. Oliver, their general agent residing in Boston, upon the application of Mr. John Bradford, in favor of the plaintiffs, and for the purpose of paying, in part, a large debt due from Bradford to the plaintiffs, for merchandise before shipped to him on credit. The letter of credit is of the following tenor:

"Boston, 4 March, 1837.

"Messrs. Morrison, Cryder & Co., London: Mr. John Bradford of this city having requested that a credit may be opened with you for his account in favor of Messrs. D. Carnegie & Co. of Gothenburg, for three thousand pounds sterling, I have assured him that the same will be accorded by you on the usual terms and conditions.

"Respectfully your ob't serv't, Francis J. Oliver.

"For £3,000."

4, 1908 (18 Niemeyer, 138). A uniform law will apply also where the existence of the contract itself is in question. R. G. Feb. 13, 1891 (47 Seuffert's Archiv, 3). As to where the place of performance is in general deemed to be, see section 269, Civ. Code. *Italy.*—Article 9, Prel. Disp. Civ. Code, provides: "The substance and effects of obligations shall be presumed to be governed by the law of the place where the acts took place and, if the contracting parties are foreigners and subjects of the same country, by their national law. A different intent, however, may always be shown." See Cass. Turin, Feb. 4, 1891 (Giurispr. Tor. 1891, p. 153); Cass. Rome, Nov. 7, 1894 (S. 1895, 4, 13). As to commercial obligations see article 58, Com. Code: "The form and essential conditions of commercial obligations, the form of acts required for the exercise and preservation of rights springing therefrom and for their execution, as well as the effect of the acts themselves, shall be governed by the laws and usages of the place where the obligation was created, respectively, by the laws and usages of the place where said acts take place or are to be performed, reserving in all cases, however, the exceptions established by article 9 of the Preliminary Dispositions of the Civil Code with respect to persons subject to the same national law." See, also, L. Beer, Zum internationalen Obligationenrecht, 18 Niemeyer, 334–363; A. de Reuterskiöld, De la loi qui doit régir les obligations contractuelles d'après le droit international privé, 26 Clunet, 462–470, 654–663; J. Aubry, Le domaine de la loi d'autonomie en droit international privé, 23 Clunet, 465–481, 721–745; J. Aubry, De la notion de la territorialité en droit international privé, 27 Clunet, 689–704; 28 Clunet, 253–273, 643–671; 29 Clunet, 209–243.

[14] The statement of facts and a part of the opinion have been omitted.

It appears by the evidence, that Oliver was the general agent of the defendants in Boston; that this letter of credit was obtained upon the application of Bradford, and was immediately forwarded to the plaintiffs, at Gottenburg; and that notice of it was given to the defendants, at London. Mr. Oliver knew the purpose for which Bradford wanted it. He had often had similar letters of credit from Mr. Oliver before; all of which have been honored, except one other in favor of Scholfield & Co. which is now in controversy in this court. Mr. Bradford was accustomed to give satisfactory security, from time to time, to Mr. Oliver, and to pay the defendants a commission of one per cent. It also appears that upon the strength of this letter of credit, the plaintiffs drew a bill or bills on the defendants, according to the usual mode of drawing bills at Gottenburg on London, which the defendants declined accepting. Various other circumstances were given in evidence, but this is a summary of the leading facts in the case.

This action, if it can be maintained at all, as between these parties, must be maintained on the letter of credit. But a question meets us at the outset, what law shall determine the rights of the parties in this transaction? It is obvious that the undertaking of the defendants was, to do some act out of this country. The substance of that undertaking was, to give Bradford a credit for the use and benefit of Carnegie & Co.; in other words, the substance and effect of that undertaking was, to pay a sum of money to Carnegie & Co. in discharge of Bradford's debt to them, by means of bills of exchange to be drawn by Carnegie & Co. on the defendants, in their own favor, or in favor of their appointee, for their use, in consideration of the promise of Bradford to provide funds to meet those bills, giving them satisfactory security, placed in the hands of their agent, and in further consideration of a commission of one per cent. paid by Bradford.

the contract

In considering the nature of this transaction, the inquiry involves two questions: First, whether the transaction in question constitutes a contract, in which the plaintiffs have an interest; and, secondly, whether the interest of the plaintiffs in this contract is of such a character, that they can maintain an action upon it, in their own names. The question, therefore, does not depend exclusively upon the lex fori, although, as the action is brought in this commonwealth, its laws must determine whatever relates to the remedy. Supposing that the lex loci contractus is also to have a bearing on the question, it must be considered, that some of the rules, applicable to the construction and effect of contracts, are founded in positive law, established by usage or by statute, which each country will establish for itself, according to its own views of convenience and policy, and have a local operation; whilst others are derived from those great and unchangeable principles of duty and obligation, which are everywhere recognized amongst mercantile communities, and indeed amongst all civilized nations, as lying at the foundation of civil contracts, and must be considered as having the same effect, wherever by the comity of nations contracts

Whether a contract shall have one interpretation or another depends on law of place which shall govern it.

The lex fori goes only to the remedy.

Whether third parties may sue in their own names upon a bond depends upon the law of the place which governs it.

made in one country are allowed to be carried into effect by the laws of another. In some states, for instance, a bond made to one or his assigns, is regarded as a negotiable instrument, and creates an obligation to pay to the obligee or any person, who shall legally become the assignee of it. In others, a note for money, payable to one or order, creates a legal obligation to the payee only, and an indorsee cannot maintain a suit in his own name. Whether an instrument, made in a particular form, shall have the one or the other construction, will depend upon the positive law of the country which governs it; and such law therefore will determine the nature and legal obligation of the contract created by it; it is positive law, concurring with, and giving effect to, the act of the parties, which determines the nature and extent of such contract. But that a party entering into a formal stipulation to pay money, or do some other beneficial act to or for another, shall substantially perform that undertaking, is a great principle of moral as well as legal obligation, and of international as well as municipal law, recognized everywhere.

Taking it as settled, in the present case, that the defendants became subject to a duty or obligation of some kind, the real subject of discussion is, not merely as to the remedy, but whether the facts now in proof constituted a contract between these parties, which may be enforced by an action.

The objection to such an action and the ground of this defence are, that the immediate parties to the transaction were Bradford on the one side, and the defendants on the other; that to this transaction the plaintiffs were strangers; and that as Bradford acquired some right under it, and had a remedy upon it against the defendants, their contract must be deemed to be made with him and not with the plaintiffs. But this position presupposes that the same instrument may not constitute a contract between the original parties, and also between one or both of them and others, who may subsequently assent to, and become interested in its execution; an assumption quite too broad and unlimited, which the law does not warrant. In a common bill of exchange, the drawer contracts with the payee that the drawee will accept the bill; with the drawee, that if he does accept and pay the bill, he, the drawer, will allow the amount in account, if he has funds in the drawee's hands; otherwise, that he will reimburse him the amount thus paid. He also contracts with any person who may become indorsee, that he will pay him the amount, if the drawee does not accept and pay the bill. The law creates the privity. So in the familiar case of money had and received, if A. deposits money with B. to the use of C., the latter may have an action against B., though they are in fact strangers. But if C., not choosing to look to B. as his debtor, calls upon A. to pay him, notwithstanding such deposit (as he may), and A. pays him, A. shall have an action against B. to recover back the money deposited, if not repaid on notice and demand. The law, operating upon the act of the parties, creates the duty, es-

tablishes the privity, and implies the promise and obligation, on which the action is founded. Hall v. Marston, 17 Mass. 575. So in regard to a very common transaction; when one deposits money in a bank to the credit of a third person, and forwards him a certificate, or other evidence of the fact, the bank is regarded as coming under an obligation to pay the money to the person to whose credit it is thus deposited. So it is held in England, when the depositary assents to receive the money, though there is no consideration moving from the plaintiff to the defendant. Lilly v. Hays, 5 Adolph. & Ellis, 548. We think, therefore, it is no decisive objection to an action by the plaintiffs, that the act done constituted, at the same time, a contract between the defendants and Bradford, on which the latter might provisionally have had a remedy, in case the plaintiffs should not assent to, and enforce the contract, so far as it was intended for their benefit.

From this view of the case, it is manifest that the question whether a particular transaction constitutes a contract, and between whom, upon which one party can have a remedy against another by judicial proceedings, must depend upon the law governing such contract, as well as the law of the forum where it is sought to be enforced. The remedy may be sought in the form of an action at law, or a bill in equity, or before any special tribunal, according to the law of the place where it is sought. But the question whether a particular act or instrument constitutes a contract, and between what parties, is previous in its nature, and must generally be settled before any question of remedy arises.

What then is the law of the contract, or in other words, what law determines whether an act done constitutes a contract, and if so, between whom and to what effect? The general rule certainly is, that the lex loci contractus determines the nature and legal quality of the act done; whether it constitutes a contract; the nature and validity, obligation and legal effect of such contract; and furnishes the rule of construction and interpretation. There may, perhaps, be exceptions to this rule; as where parties happen to meet on a desolate island in a savage country, where the principles of commerce and civilization do not prevail, or where a settled municipal law is not enforced or regarded. Perhaps such would be the construction of a contract between American or European merchants in China, who rather reside on the confines of that empire, than live under its government; and where they may be presumed to have reference, in their dealings, to the general laws and usages of the commercial world, without regard to the laws of the people with whom they temporarily reside. But a contract, made in one country, may contemplate the execution of deeds or other contracts, making payments or doing other legal acts, in another; in regard to which, the law of the foreign country, where the act is to be done, will govern the contract; and the obligation of such contract will bind the contracting party to do all such legal acts, according to the law of the place where they are to operate, so as to

have their full legal effect. As if a person in one country should contract to convey land in another; the general rule being that the lex loci rei sitæ furnishes the rule which regulates titles and conveyances of real estate, the true construction and legal effect of such contract would be, that the conveyance should be executed in such form as effectually to transfer the title, according to the law of the place where the land lies. If the land were in Massachusetts, where the law requires the execution and acknowledgment of a deed, it would bind the contracting party to execute and acknowledge such deed, though made in a country where, by its municipal law, a deed would not be necessary. If the stipulation be, that the drawee shall accept a bill in a foreign country, and the law of that country require that a valid acceptance shall be in writing, though not required by the law of the place where drawn, it is a contract that the drawee shall accept the bill in writing.

That the transaction now in question constituted a good contract to some purpose, and between some parties; that it was made on a good, valuable and adequate consideration, and made in Massachusetts, is not contested. Then the rule prima facie is, that the construction and legal effect of this transaction are to be determined by the law of Massachusetts. That is the law which must be regarded, in the first instance, in deciding whether the act done constituted a contract, and if so, between whom, and to what effect, and must prevail unless the case falls within some exception to the general rule; and the question is, whether it does. It is true that the parties to this suit are both foreigners, one residing in Sweden, and the other in England. This, however, is immaterial, and only respects the question who may sue and be sued in our courts. By the comity of nations, alien friends are allowed the benefit of our courts in seeking their civil rights, as plaintiffs; and the defendants, by placing their property under the control and protection of our government, place themselves within the jurisdiction of our courts. But the immediate actors in the transactions were here. Bradford, the prime mover, who opened and conducted the negotiation, paid the consideration, and caused the obligation to be entered into, was a resident citizen of Massachusetts; and though in legal strictness he might not be considered as the agent of the plaintiffs, before they had assented to and adopted his act, yet still he so far acted for them, as to procure a stipulation, which, if executed, would enure to their benefit. The other party, though domiciled abroad, was here for the purpose of conducting mercantile and financial business, by their regularly constituted resident agent. The money was paid, or the security given, in Boston, which constituted the consideration for the defendants' undertaking. The negotiation, which terminated in giving the letter of credit, was commenced and completed in Boston.

That some things are referred to foreign laws and usages, in this agreement, is manifest in the instrument itself. The words, "on the

usual terms and conditions" are obviously of this character. They refer to the laws and usages both of Sweden and England. All parties of course knew that the credit was to be given by the defendants, by means of bills of exchange, although this is not expressed in terms. Supposing that the object was, that this credit should be afforded by means of bills of exchange, to be drawn by Carnegie & Co. in Gottenburg, on Morrison & Co. in London, the instrument refers to the laws and usages of Sweden, for the mode of drawing, and to those of England for the mode of acceptance; and the legal effect and obligation of the contract in Boston are, that the parties will respectively conform to those laws and usages, in the performance of their respective acts. But it is not as to the nonobservance of any of these, that the question arises. The gravamen of the complaint is, that the defendants have violated the obligation of their contract, in its entire substance. It becomes therefore necessary to inquire, and ascertain more exactly, what that contract, in its legal effect and operation, was. The substance of the undertaking of the defendants may, we think, be simplified and expressed thus: Whereas John Bradford is indebted to Messrs. Carnegie & Co. of Gottenburg, in the sum of £3,000, and has requested us to pay them that amount for him, by means of bills of exchange to be drawn on us at London; we hereby, for value received of him for that purpose, to our satisfaction, promise to accept their bills to that amount, payable to themselves or their order, and pay them accordingly.

The question is, supposing a general failure in the performance of this undertaking, who is entitled to a remedy for such breach, and by what law shall this question be determined? The assurance or promise is in terms made to Bradford; but the substantial benefit to be derived from the performance of it would be the plaintiffs', and therefore they are damnified by the breach. Bradford had procured the defendants to pay his debt for him to the plaintiffs, for a satisfactory pecuniary consideration, and immediately gave notice thereof, and remitted the contract to the plaintiffs, who assented to and accepted it. It may be fairly presumed, that but for this transaction, Bradford would have adopted some other mode of remittance. Regarding it as a question of principle and not of technical law, it was an undertaking, in which the plaintiffs had an interest, nearly or quite as direct and as great, as if the promise had been in terms to them, or the negotiation had been with them; or as if the instrument had been a promissory note, procured by Bradford to be made payable to them, in consideration of money paid and security given by him, and such note afterwards remitted to and received by them. Upon these facts, the court are of opinion that the construction, the obligation, the legal effect and operation of this transaction are to be governed by the law of Massachusetts. So far as this transaction constituted a legal and binding contract at all, it was, we think, by force of the law of the place of contract, operating upon the act of the parties, and giving

it force as such. The undertaking, it is true, was to do certain acts in England, to wit, to accept and pay the plaintiffs' bills; but the obligation to do those acts was created here, by force of the law of this state, giving force and effect to the undertaking of the defendants' agent, and making it a contract binding on them. Supposing the law of England had provided that no letter of credit should be issued, unless under seal, or stamped, or attested by two witnesses, or acknowledged before a notary; is it not clear, that as no such formalities are required by our laws, a letter of credit, made here, would be held good, without such formalities? We think it would be so held even in England, under the authority of the general rule, that a contract, valid and binding at the place where made, is binding everywhere. There is no reference, tacit or express, in this instrument, to the laws of England, which can raise a presumption, that the parties looked to them as furnishing the rule of law, which should govern this contract. It was, therefore, in our opinion, in legal effect, a contract made in Massachusetts, by parties both of whom were here by their agents, or persons acting for their benefit and in their behalf, and therefore the nature, obligation and effect of this contract must be governed by the law of this commonwealth. * * *

Rg

Rg.

Counsel: Contra preceding. Acc. with In Re Missouri

Pritchard became surety & ~~P~~ surety, & had to pay. The Δs had promised to indemnify him. He Δs moved to be liable on this indemnity promise in La. but not N.Y. Quære: Which law controls? The bond was executed in N.Y., but payable in La. Held: La. law controls, ∴ Δs bound.

PRITCHARD v. NORTON.

(Supreme Court of the United States, 1882. 106 U. S. 124, 1 Sup. Ct. 102, 27 L. Ed. 104.)

Error to the Circuit Court of the United States for the District of Louisiana.

Ex Norton and H. S. McComb executed and delivered to Richard Pritchard a bond of indemnity in the state of New York in which they undertook to indemnify him against all loss or damage arising from his liability as surety on an appeal bond executed by him on behalf of the defendant, appellant in the suit of J. P. Harrison, Jr., v. New Orleans, Jackson & Great Northern R. Co., then pending in the Louisiana courts. Judgment was rendered on that appeal against the railroad company, in satisfaction of which R. Pritchard became liable to pay and did pay the amount to recover which this action was brought by Eliza D. Pritchard, executrix of R. Pritchard, deceased, against Norton. The defendant set up, by way of defense, that the bond sued on was without consideration and void under the laws of the state of New York. Judgment for defendant.[15]

MATTHEWS, J.[16] It is claimed on behalf of the plaintiff in error

[15] This statement of facts has been substituted for that of the original report.

[16] A part of the opinion has been omitted.

Rg: for parties intended contract to be gov. by laws of La. although entered into in N.Y.

that by the law of Louisiana the pre-existing liability of Pritchard as surety for the railroad company would be a valid consideration to support the promise of indemnity, notwithstanding his liability had been incurred without any previous request from the defendant. This claim is not controverted, and is fully supported by the citations from the Civil Code of Louisiana of 1870 (articles 1893–1960) and the decisions of the Supreme Court of that state. Flood v. Thomas, 5 Mart. (N. S.) 562; New Orleans Gas Light & Banking Co. v. Paulding, 12 Rob. (La.) 378; New Orleans & C. R. Co. v. Chapman, 8 La. Ann. 98; Keane v. Goldsmith, 12 La. Ann. 560. In the case last mentioned it is said that "the contract is, in its nature, one of personal warranty, recognized by articles 378 and 379 of the Code of Practice." And it was there held that a right of action upon the bond of indemnity accrued to the obligee when his liability became fixed as surety by a final judgment, without payment on his part, it being the obligation of the defendants upon the bond of indemnity to pay the judgment rendered against him, or to furnish him the money with which to pay it.

The single question presented by the record, therefore, is whether the law of New York, or that of Louisiana, defines and fixes the rights and obligations of the parties. If the former applies, the judgment of the court below is correct; if the latter, it is erroneous. The argument in support of the judgment is simple, and may be briefly stated. It is that New York is the place of the contract, both because it was executed and delivered there, and because no other place of performance being either designated or necessarily implied, it was to be performed there; wherefore, the law of New York, as the lex loci contractus, in both senses being lex loci celebrationis and lex loci solutionis, must apply to determine not only the form of the contract, but also its validity. On the other hand, the application of the law of Louisiana may be considered in two aspects, as the lex fori, the suit having been brought in a court exercising jurisdiction within its territory and administering its laws, and as the lex loci solutionis, the obligation of the bond of indemnity being to place the fund for payment in the hands of the surety, or to repay him the amount of his advance, in the place where he was bound to discharge his own liability.

[After holding that the question of consideration, whether arising upon the admissibility of evidence or presented as a point in pleading, was not one of procedure and remedy but went to the substance of the right itself, the learned justice continued as follows:]

The phrase lex loci contractus is used, in a double sense, to mean, sometimes, the law of the place where a contract is entered into; sometimes, that of the place of its performance. And when it is employed to describe the law of the seat of the obligation, it is, on that account, confusing. The law we are in search of, which is to decide upon the nature, interpretation, and validity of the engagement in question, is that which the parties have, either expressly or presumptively, incor-

porated into their contract as constituting its obligation. It has never been better described than it was incidentally by Mr. Chief Justice Marshall in Wayman v. Southard, 10 Wheat. 48, 6 L. Ed. 253, where he defined it as a principle of universal law—"the principle that in every forum a contract is governed by the law with a view to which it was made." The same idea had been expressed by Lord Mansfield in Robinson v. Bland, 2 Burr. 1077. "The law of the place," he said, "can never be the rule where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed." And in Lloyd v. Guibert, L. R. 1 Q. B. 120, in the Court of Exchequer Chamber, it was said that "it is necessary to consider by what general law the parties intended that the transaction should be governed, or, rather, by what general law it is just to presume that they have submitted themselves in the matter." Le Breton v. Miles, 8 Paige (N. Y.) 261.

It is upon this ground that the presumption rests that the contract is to be performed at the place where it is made, and to be governed by its laws, there being nothing in its terms, or in the explanatory circumstances of its execution, inconsistent with that intention. So, Phillimore says (4 Int. Law, 469): "It is always to be remembered that in obligations it is the will of the contracting parties, and not the law, which fixes the place of fulfillment—whether that place be fixed by express words or by tacit implication—as the place to the jurisdiction of which the contracting parties elected to submit themselves." The same author concludes his discussion of the particular topic (4 Int. Law, § 654, pp. 470–471) as follows: "As all the foregoing rules rest upon the presumption that the obligor has voluntarily submitted himself to a particular local law, that presumption may be rebutted, either by an express declaration to the contrary, or by the fact that the obligation is illegal by that particular law, though legal by another. The parties cannot be presumed to have contemplated a law which would defeat their engagements." This rule, if universally applicable—which perhaps it is not—though founded on the maxim, "Ut res magis valeat quam pereat," would be decisive of the present controversy, as conclusive of the question of the application of the law of Louisiana, by which alone the undertaking of the obligor can be upheld. At all events, it is a circumstance highly persuasive in its character of the presumed intention of the parties, and entitled to prevail, unless controlled by more express and positive proofs of a contrary intent. It was expressly referred to as a decisive principle in Bell v. Packard, 69 Me. 105, 31 Am. Rep. 251, although it cannot be regarded as the foundation of the judgment in that case. Milliken v. Pratt, 125 Mass. 374, 28 Am. Rep. 241.

If now we examine the terms of the bond of indemnity, and the situation and relation of the parties, we shall find conclusive corroboration of the presumption that the obligation was entered into in view of the laws of Louisiana.

The antecedent liability of Pritchard, as surety for the railroad company on the appeal bond, was confessedly contracted in that state, according to its laws, and it was there alone that it could be performed and discharged. Its undertaking was that Pritchard should, in certain contingencies, satisfy a judgment of its courts. That could be done only within its territory and according to its laws. The condition of the obligation, which is the basis of this action, is that McComb and Norton, the obligors, shall hold harmless and fully indemnify Pritchard against all loss or damage arising from his liability as surety on the appeal bond. A judgment was, in fact, rendered against him on it in Louisiana. There was but one way in which the obligors in the indemnity bond could perfectly satisfy its warranty. That was, the moment the judgment was rendered against Pritchard on the appeal bond, to come forward in his stead, and, by payment, to extinguish it. He was entitled to demand this before any payment by himself, and to require that the fund should be forthcoming at the place where otherwise he could be required to pay it. Even if it should be thought that Pritchard was bound to pay the judgment recovered against himself, before his right of recourse accrued upon the bond of indemnity, nevertheless he was entitled to be reimbursed the amount of his advance at the same place where he had been required to make it. So that it is clear, beyond any doubt, that the obligation of the indemnity was to be fulfilled in Louisiana, and, consequently, is subject, in all matters affecting its construction and validity, to the law of that locality.

This construction is abundantly sustained by the authority of judicial decisions in similar cases.

In Irvine v. Barrett, 2 Grant, Cas. (Pa.) 73, it was decided that where a security is given in pursuance of a decree of a court of justice, it is to be construed according to the intention of the tribunal which directed its execution, and, in contemplation of law, is to be performed at the place where the court exercises its jurisdiction; and that a bond given in another state, as collateral to such an obligation, is controlled by the same law which controls the principal indebtedness. In the case of Penobscot & K. R. Co. v. Bartlett, 12 Gray (Mass.) 244, 71 Am. Dec. 753, the Supreme Judicial Court of Massachusetts decided that a contract made in that state to subscribe to shares in the capital stock of a railroad corporation established by the laws of another state, and having their road and treasury there, is a contract to be performed there, and is to be construed by the laws of that state. In Lanusse v. Barker, 3 Wheat. 146, 4 L. Ed. 343, this court declared that "where a general authority is given to draw bills from a certain place, on account of advances there made, the undertaking is to replace the money at that place."

The case of Cox v. United States, 6 Pet. 172, 8 L. Ed. 359, was an action upon the official bond of a navy agent. The sureties contended that the United States were bound to divide their action, and take judgment against each surety only for his proportion of the sum due, ac-

cording to the laws of Louisiana, considering it a contract made there, and to be governed in this respect by the law of that state. The court, however, said: "But admitting the bond to have been signed at New Orleans, it is very clear that the obligations imposed upon the parties thereby looked for its execution to the city of Washington. It is immaterial where the services as navy agent were to be performed by Hawkins. His accountability for nonperformance was to be at the seat of government. He was bound to account, and the sureties undertook that he should account, for all public moneys received by him, with such officers of the government of the United States as are duly authorized to settle and adjust his accounts. The bond is given with reference to the laws of the United States on that subject. And such accounting is required to be with the treasury department at the seat of government; and the navy agent is bound by the very terms of the bond to pay over such sum as may be found due to the United States on such settlement; and such paying over must be to the treasury department, or in such manner as shall be directed by the secretary. The bond is, therefore, in every point of view in which it can be considered, a contract to be executed at the city of Washington, and the liability of the parties must be governed by the rules of the common law." This decision was repeated in Duncan v. United States, 7 Pet. 435, 8 L. Ed. 739.

These cases were relied on by the Supreme Court of New York in Commonwealth of Kentucky v. Bassford, 6 Hill (N. Y.) 526. That was an action upon a bond executed in New York conditioned for the faithful performance of the duties enjoined by a law of Kentucky authorizing the obligees to sell lottery tickets for the benefit of a college in that state. It was held that the stipulations of the bond were to be performed in Kentucky, and that, as it was valid by the laws of that state, the courts of New York would enforce it, notwithstanding it would be illegal in that state.

Boyle v. Zacharie, 6 Pet. 635, 8 L. Ed. 527, is a direct authority upon the point. There Zacharie and Turner were resident merchants at New Orleans, and Boyle at Baltimore. The latter sent his ship to New Orleans, consigned to Zacharie and Turner, where she arrived, and, having landed her cargo, the latter procured a freight for her to Liverpool. When she was ready to sail she was attached by process of law at the suit of certain creditors of Boyle, and Zacharie and Turner procured her release by becoming security for Boyle on the attachment. Upon information of the facts Boyle promised to indemnify them for any loss they might sustain on that account. Judgment was rendered against them on the attachment bond, which they were compelled to pay, and to recover the amount so paid they brought suit in the Circuit Court for Maryland against Boyle upon his promise of indemnity. A judgment was rendered by confession in that cause, and a bill in equity was subsequently filed to enjoin further proceedings on it, in the course of which various questions arose among them whether the promise of

indemnity was a Maryland or a Louisiana contract. Mr. Justice Story, delivering the opinion of the court, said: "Such a contract would be understood by all parties to be a contract made in the place where the advance was to be made, and the payment, unless otherwise stipulated, would also be understood to be made there;" "that the contract would clearly refer for its execution to Louisiana."

The very point was also decided by this court in Bell v. Bruen, 1 How. 169, 11 L. Ed. 89. That was an action upon a guaranty written by the defendant in New York, addressed to the plaintiffs in London, who at the latter place had made advances of a credit to Thorn. The operative language of the guaranty was "that you may consider this, as well as any and every other credit you may open in his favor, as being under my guaranty." The court said: "It was an engagement to be executed in England, and must be construed to have effect according to the laws of that country;" citing Bank of United States v. Daniel, 12 Pet. 54, 9 L. Ed. 989. As the money was advanced in England, the guaranty required that it should be replaced there, and that is the precise nature of the obligation in the present case. Pritchard could only be indemnified against loss and damage on account of his liability on the appeal bond, by having funds placed in his hands in Louisiana wherewith to discharge it, or by being repaid there the amount of his advance. To the same effect is Woodhull v. Wagner, Baldw. 296, Fed. Cas. No. 17,975.

We do not hesitate, therefore, to decide that the bond of indemnity sued on was entered into with a view to the law of Louisiana as the place for the fulfillment of its obligation; and that the question of its validity, as depending on the character and sufficiency of the consideration, should be determined by the law of Louisiana, and not that of New York.

For error in its rulings on this point, consequently, the judgment of the circuit court is reversed, with directions to grant a new trial. New trial ordered.

GRAND v. LIVINGSTON.

(Supreme Court of New York, Appellate Division, 1896. 4 App. Div. 589, 38 N. Y. Supp. 490.)[17]

Action by D. H. Grand against Johnston Livingston, as president of the National Express Company. On November 4, 1894, plaintiff delivered to the defendant at Boston a quantity of horses to be transported to and to be delivered in Buffalo, N. Y. In consequence of the negligence of the defendant, they were seriously injured while in transit. At the time of delivering the horses to the defendant for shipment the shipper had been required to sign a contract under the terms of which the defendant was released from any liability for injury, damage, or loss to the horses arising from defendant's negligence.[18]

ADAMS, J. The question of the defendant's negligence, as well as that of the contributory negligence of the plaintiffs' representatives, was submitted to the jury upon evidence which was somewhat conflicting in its character, but which, it is conceded, was ample to support the verdict; and the only question presented by the record which appears to require serious examination is that which arises upon the construction given by the trial court to the release which is embodied in the shipping contract entered into contemporaneously with the delivery of the horses to the defendant. This instrument is as broad and comprehensive in its terms as language can possibly make it, and, if valid, amounts to an absolute release of the defendant from all liability for duty omitted, as well as for affirmative acts of negligence, however gross may be their character. Such a contract has never been recognized as possessing any validity in the state of Massachusetts (School Dist. in Medfield v. Boston, H. & E. R. Co., 102 Mass. 552, 3 Am. Rep. 502; Pemberton Co. v. New York Cent. R. Co., 104 Mass. 144; Walsh v. New York & N. E. R. Co., 160 Mass. 571, 36 N. E. 584, 39 Am. St. Rep. 514); while, upon the other hand, the courts of this state have held, and it is now the accepted law of the state, that carriers may, by express stipulation, limit their common-law liability to the extent of relieving themselves from the consequences of their negligent acts. Mynard v. Syracuse, B. & N. Y. R. Co., 71 N. Y. 180, 27 Am. Rep. 28; Nicholas v. New York Cent. & H. R. R. Co., 89 N. Y. 370; Kenney v. New York Cent. & H. R. R. Co., 125 N. Y. 422, 26 N. E. 626. It is to be noted, however, that this rule is applicable to cases only in which the language of the contract is plain and unequivocal, and that there is an apparent tendency in the later decisions to restrict its operation to the very narrowest possible compass. Our attention has not been directed to any case which sanctions so thorough and radical a divesting of all liability

[17] Affirmed 158 N. Y. 688, 53 N. E. 1125.

[18] The statement of facts has been somewhat abridged.

as is sought to be accomplished by the release in question, nor do we believe that the rule ought to be extended so as to exempt the carrier from the consequences of gross negligence, although it is, perhaps, unnecessary to express any opinion upon that subject, inasmuch as we are disposed to consider the case from another and somewhat different standpoint.

The value which attaches to the exemption clause of this contract depends, necessarily and in any event, upon whether it is governed by the law of Massachusetts, or by the law of this state; and the determination of this question involves not only a careful examination of the instrument itself, but likewise of all the circumstances attending its execution. First in importance, therefore, is the fact that the contract was executed in the former state, and this of itself furnishes sufficient reason for concluding that the law of that state is controlling, unless it is made to appear that it was the intention of the parties, when entering into the contract, to be bound by the law of some other state. This statement of the law of the place is one which might, perhaps, be safely permitted to rest upon principle; but it is supported by abundant authority.

In the case of Lloyd v. Guibert, 6 Best & S. 100, it was said, by Mr. Justice Willes, in delivering the judgment, that: "It is generally agreed that the law of the place where the contract is made is, prima facie, that which the parties intended, or ought to be presumed to have adopted, as the footing upon which they dealt, and that such law ought, therefore, to prevail, in the absence of circumstances indicating a different intention, as, for instance, that the contract is to be entirely performed elsewhere, or that the subject-matter is immovable property situated in another country."

In another English case the same doctrine was enunciated by Denman, J., in the following language, which was subsequently approved by the Court of Appeal: "The general rule is that, where a contract is made in England, between merchants carrying on business here, as this is, but to be performed elsewhere, the construction of the contract and all its incidents are to be governed by the law of the country where the contract is made, unless there is something to show that the intention of the parties was that the law of the country where the contract is to be performed should prevail." Jacobs v. Crédit Lyonnais, 12 Q. B. Div. 589, 596, 600.

And this general rule has been recognized and adopted in this country by an almost unbroken line of decisions of both the state and federal courts, to some of which it may be advisable to advert briefly.

In the case of McDaniel v. Chicago & N. W. Ry. Co., 24 Iowa, 412, which was quite similar in its main features to the one at bar, and in which it appears that the cattle transported by a railroad company from a place in Iowa to a place in Illinois, under a special contract made in the former state, containing a stipulation that the company should be exempt from liability for any damage, unless resulting

from collision or derailing of trains, were injured in Illinois by the negligence of the company's servants, it was held that the case was to be governed by the law of Iowa, which permitted no common carrier to exempt himself from the liability which would exist in the absence of the contract. The court, Chief Justice Dillon presiding, said: "The contract being entire and indivisible, made in Iowa, and to be partly performed here, it must, as to its validity, nature, obligation, and interpretation, be governed by our law."

So, too, in Pennsylvania Co. v. Fairchild, 69 Ill. 260, where a railroad company received, in Indiana, goods consigned to a party in Leavenworth, Kan., and which were destroyed by fire while in transit, the court held that the case must be governed by the law of Indiana, by which one of the carriers was not liable for the loss of goods after they passed into the custody of a connecting line; while, as early as 1832, Mr. Justice Thompson, of the United States Supreme Court, in Cox v. United States, 6 Pet. 172, 8 L. Ed. 359, applied the same rule, which has been frequently reiterated by that court down to the present time. Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788.

The cases in our own state which contain express recognition of this rule are very numerous, and it can hardly be necessary or profitable to cite more than one or two of them.

In Dyke v. Erie Ry. Co., 45 N. Y. 113, 116, 6 Am. Rep. 43, it was said, by Allen, J.: "The lex loci contractus determines the nature, validity, obligation, and legal effect of the contract, and gives the rule of construction and interpretation, unless it appears to have been made with reference to the laws and usages of some other state or government, as when it is to be performed in another place; and then, in conformity to the presumed intention of the parties, the law of the place of performance furnishes the rule of interpretation."

And in China Mut. Ins. Co. v. Force, 142 N. Y. 90–100, 36 N. E. 874, 40 Am. St. Rep. 576, it is said that: "The obligation of the shippers of the cargo is to be determined by the law of the place where the contract of affreightment was made."

If, then, the rule which has been thus far considered is applied to this case, it follows that the release under which the defendant seeks to escape liability must be given effect and construed under the law which obtains in Massachusetts, unless it can be fairly said that the parties thereto, at the time of executing the same, clearly manifested an intention that it should be governed by the law of this state, which intention, it may be added, must have been entertained by both of them. And, as we have seen that the law where it was executed affords prima facie evidence of the intent of the parties, the burden would seem to rest upon the defendant of overcoming the presumption thus created, by satisfactory proof.

It was said by Andrews, Chief Judge, in the Nicholas Case, supra,

that: "The circumstances under which contracts of this kind are usually made preclude a careful consideration, by the shipper, of their language and effect."

And for this reason, as was suggested upon the argument, the question of intent can hardly be said to involve the actual mental operations of the parties. For, as a matter of fact, they probably did not stop to consider what was the legal effect of their agreement, or whether there was any diversity in the law of the two states; and, therefore, when we speak of the "question of intent," we are making use of what may perhaps be termed a "legal fiction"; but, nevertheless, the law does look at the acts of the parties, and the circumstances surrounding them, which may possibly have exerted some influence upon their actions, and then assumes that their intention is in harmony with such acts and circumstances.

The facts relied upon by the defendant as indicating an intention to bring the contract within the operation of the law of this state are: (1) That this state is the legal residence of the defendant, and the actual residence of the plaintiffs; (2) that the contract, so far as delivery is concerned, was to be performed in this state; and (3) that no effect could be given to the provisions of the contract, if the same is to be interpreted by the law which obtains in the state where it was executed. It is undoubtedly a well-settled rule of construction that meaning and effect shall be given to all of the language employed in a contract, provided it can be done without violence to the plain object and intent of the parties thereto. Buffalo E. S. R. Co. v. Buffalo St. R. Co., 111 N. Y. 132, 19 N. E. 63, 2 L. R. A. 284. And if this contract was one which had been drawn up at the time of its execution, to express the intention of the parties in this particular transaction, it might be urged, with considerable force, that the law of this state should be invoked, in order that effect might be given to all its provisions; but it appears that the agreement was completed by filling up a blank form with such words as were necessary to fit the occasion, and, presumably, just such a form as was used by the company in its business throughout the entire country, or wherever it had an office. And this circumstance must be regarded as lessening somewhat the force which might otherwise attach to the defendant's contention in this regard. The residence of the parties, and the fact that the contract, by its terms, was to be partly performed within this state, are certainly circumstances which might very properly be considered in determining the question of intent, and which might, perhaps, prove efficient aids to the court in its effort to reach a correct solution thereof, were there nothing in the case to counterbalance them; but, in considering this question, two distinct facts or circumstances are made prominent, either one of which, we think, is sufficient to overcome any inference which may be properly drawn from those relied upon by the defendant, and which have just been adverted to.

It has already been stated that, when these horses were shipped, it was arranged that two representatives of the plaintiffs should accompany them upon their trip to Buffalo. This, it seems, was required, as one of the conditions of transporting the horses, and no additional fare was charged for these men; but they, too, were obliged to enter into a contract with the express company absolving it from all liability for injury to their person or property. This supplemental release was indorsed upon the back of the original contract, and in that the defendant was careful to insert a clause expressly providing that any question arising thereunder should "be determined by the law of the state of New York." This certainly furnishes sufficient evidence to justify the conclusion that, when the defendant desired to bring any contract within the operation of the law of a particular state, it was aware of the importance and necessity of expressing such design in language which was incapable of misconstruction; and therefore its omission to insert a similar provision in its original contract possesses a significance which cannot be disregarded in the effort to ascertain the intent of at least one of the parties thereto.

The other circumstance, to which allusion has been made, arises out of the fact that to give to this contract the construction contended for by the defendant would make a contract for the plaintiffs which, to say the least, is a very unreasonable one, and which would place them entirely at the mercy of the defendant. And this, in the absence of any other circumstance, would, in our opinion, afford sufficient reason for refusing such a construction. Russell v. Allerton, 108 N. Y. 288, 15 N. E. 391.

We think that the case was properly disposed of at the circuit, and that no sufficient ground is presented for interfering with the result reached, and that the judgment and order appealed from should therefore be affirmed, with costs.

Judgment and order affirmed, with costs. All concur.

HOME LAND & CATTLE CO. v. McNAMARA.

(Circuit Court of Appeals, Seventh Circuit, 1906. 145 Fed. 17, 76 C. C. A. 47.)

In error to the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

GROSSCUP, Circuit Judge.[19] This case—an action at law in the Circuit Court to recover the purchase price of cattle delivered by plaintiff in error to defendants in error—was here once before (McNamara & Marlow v. Home Land & Cattle Co., 121 Fed. 797, 58 C. C. A. 245) the judgment of the court below being reversed, chiefly because Mc-

[19] A part of the opinion not relating to the Conflict of Laws has been omitted.

Namara and Marlow had been excluded from showing damages suffered by them in the failure of the Home Land and Cattle Company to perform the ninth paragraph of the agreement between them.

On the second trial this error was corrected; but in its correction, instead of permitting McNamara and Marlow to prove the actual damages suffered by them, by plaintiff in error's failure to perform, they were allowed the sums stipulated in the paragraph as liquidated damages—the jury being practically instructed to accept the stipulated sum as the measure of damages. And upon this action of the court below, exceptions having been duly preserved, this proceeding in error is chiefly based.

The ninth clause of the contract is as follows:

"Ninth. Said first party hereby guarantees to deliver to said second parties during the season of 1897 not less than nine thousand head (9,000) of steers of the ages of three years old and up, and spayed heifers of the ages of four years and up. Should they fail so to do, they hereby agree to pay to said second parties the sum of twenty dollars ($20.00) in cash for each and every head less than nine thousand (9,000) head of such cattle so delivered."

The statute of Montana (Civ. Code, 1895) in force at the time the agreement was made and the case tried, contains the following provision:

"Section 2243. Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent, void, except as expressly provided in the next section.

"Section 2244. The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."

In Illinois there is no statute upon the subject.

Two questions, therefore, are raised. First: Is the ninth clause of the agreement to be governed by the law of Montana, or by the law of Illinois? And if it be governed by the law of Montana, Secondly: Was the subject-matter of the contract one in which damages would be impracticable or difficult to ascertain?

The contract was made in Illinois, but the subject-matter of the contract was the purchase and sale of cattle then in Montana, to be delivered by the seller to the buyer in Montana. The contract, therefore, especially in its main provision, was one to be executed in Montana.

When confronted with the inquiry under what law a specific contract is to be interpreted and enforced, the principle that governs is this: In view of what law was the contract made. Wayman v. Southard, 10 Wheat. 1, 48, 6 L. Ed. 253. And apart from any circumstance other than the contract itself, we think it obvious that the law in view was the Montana law, where the contract was to be executed. Such, apparently, was the understanding of defendants in error, for they

asked and obtained interest upon the default, according to the rates allowed by the laws of Montana. And such must have been the view of the court below, for the interest was allowed according to the Montana law. Indeed, other considerations being equal, the presumption is that the law where the performance is to take place is the law under which the performance shall be governed.

But it is argued, on the authority of Pritchard v. Norton, 106 U. S. 124, 1 Sup. Ct. 102, 27 L. Ed. 104, that assuming that the law of Montana forbade that portion of the contract relating to liquidated damages, such circumstance, alone, shows that the law of Montana was not in the view of the parties, but that, within their view, the contract was to be governed by the law of Illinois, where the contract was made, and where no such prohibition exists. Pritchard v. Norton did not involve, however, the validity or invalidity of a mere subsidiary part of a larger contract. The question presented in that case was the validity or invalidity of the whole contract. Did the sale and purchase of these cattle, as an entirety, depend for validity upon whether the contract was to be governed by the Montana law or the Illinois law, Pritchard v. Norton would perhaps be in point. But such is not the case. The sale and purchase here involved is valid under the law of either state. Damages for failure to perform follow under the law of either state. It is to the measure of damages alone—an incident only to the general and greater purpose of the contract as an entirety—that the circumstance relates; a circumstance that cannot be accepted as showing that the parties meant that the whole contract should be determined by the law of a state other than that where the whole contract was to be performed. * * *

The view already expressed, that the contract as an entirety is to be governed, under the circumstances shown, by the laws of Montana, disposes of the question of the rate of interest involved, the only other question that in view of a new trial needs to be decided. On the question of interest the court below was not in error.

The judgment of the court below is reversed, with instructions to grant a new trial.

DAVIS v. ÆTNA MUT. FIRE INS. CO.

(Supreme Court of New Hampshire, 1892. 67 N. H. 218, 34 Atl. 464.)

Assumpsit, on policies of insurance against fire. Facts agreed. The plaintiff, at the date of the policies was, and still is, a resident of Massachusetts, and the property insured is situate in Massachusetts. The defendant companies were organized under the laws of New Hampshire, and their principal place of business is in New Hampshire. The plaintiff applied for insurance to a broker in Massachusetts, who applied to brokers in Indiana, and they sent applications to the defend-

ants at Concord, N. H., and the policies were there made. The defendant companies issue two forms of policies—one, the New Hampshire standard form, which they issue to cover risks on property situate in New Hampshire; the other, like the policies in suit, which is not the New Hampshire standard form, and does not contain the statute laws of New Hampshire or any reference thereto, this form being used by them only on property situate outside of New Hampshire. The policies in suit contain certain provisions which are invalid if the contracts are governed by the statutes of New Hampshire, and the defendants set up defenses based upon such provisions. If the contracts are held to be Massachusetts contracts, or not to be construed in accordance with the New Hampshire statutes, the cases are to stand for trial; otherwise, the plaintiff is to have judgment.

BLODGETT, J. The policies in suit having been made at the defendants' office in this state, on applications received by mail, the contracts became complete when the policies were deposited in the mail to be forwarded to the insurance brokers from whom the applications were received (Abbott v. Shepard, 48 N. H. 14; Tayloe v. Merchants' Fire Ins. Co., 9 How. (U. S.) 390, 13 L. Ed. 187; Shattuck v. Mutual Life Ins. Co., 4 Cliff. (U. S.) 598, Fed. Cas. No. 12,715; Utley v. Donaldson, 94 U. S. 29, 45, 24 L. Ed. 54; Eames v. Home Ins. Co., 94 U. S. 621, 24 L. Ed. 298; Bailey v. Hope Ins. Co., 56 Me. 474); and, as the general rule is that the law of the place where the contract is made is to govern as to its nature, validity, construction, and effect (Stevens v. Norris, 30 N. H. 466, 470), prima facie the contracts in question are New Hampshire contracts, and are to be interpreted accordingly. If, however, the parties to a contract have a view to its being executed elsewhere, it is to be governed according to the laws of the place where it is to be executed. Cox v. United States, 6 Pet. (U. S.) 172, 203, 8 L. Ed. 359; Warder v. Arell, 2 Wash. (Va.) 282, 1 Am. Dec. 488; Bish. Cont. § 731, and authorities cited. "The primary rule in all expositions of this sort is that of common sense." Story, Confl. Laws, § 270. The object is to ascertain the real intention of the parties; and, to ascertain that intention, regard may be had to the nature of the instrument itself, the situation of the parties executing it, and the purpose they had in view. Corwin v. Hood, 58 N. H. 401; Dyer v. Hunt, 5 N. H. 401, 405. In short, the intention is to be ascertained from all competent evidence. Crawford v. Parsons, 63 N. H. 438.

Applying these rules to the contracts under consideration, there is little, if any, room for doubt or disputation that the parties intended that they should be governed by the law of Massachusetts. The property covered by the policies was located in that state. The assured resided there. The New Hampshire standard form of policy was not used. The parties did not agree to be bound by that form, but they did agree to be bound by a special and radically different form, which is used by the defendants "only upon property situated outside of New Hampshire." These facts afford competent evidence and satisfactory

proof that the intention of the defendants was to contract with reference to the laws of Massachusetts; and the inference is equally strong that the intention of the plaintiff was not otherwise. The contracts are to be construed by the laws of Massachusetts. Case discharged.

ARBUCKLE v. REAUME.

(Supreme Court of Michigan, 1893. 96 Mich. 243, 55 N. W. 808.)

LONG, J. This action was brought to recover upon two promissory notes, dated February 4, 1889, and executed and delivered to the plaintiffs' agent in this state, but payable at plaintiffs' office, at Toledo, Ohio. The defendant Peter Donnelly pleaded the general issue, and denied the execution of the notes. The other defendants did not appear, and were defaulted. It was admitted that, while the notes bore date as of Monday, they were in fact executed and delivered to the agent of the payee in this state on Sunday. The court below ruled that, though the notes were executed and delivered in this state on Sunday, yet, the testimony showing that the office of the plaintiffs was in Ohio, and the contract to be performed there, that they were not void, under section 2015, How. St., as the laws of Ohio, and not of Michigan, governed the transaction; and judgment was given in favor of the plaintiffs. It was not shown upon the trial what the statute laws of the state of Ohio were. The only contention upon this record is whether the question is to be determined by the law of the place where the notes were executed and delivered or by the law of the state where made payable. The notes were given for machinery. The contract of sale was made in this state, and the property delivered here. The notes were taken by the plaintiffs' agent on the delivery of the machinery; the whole transaction being closed on Sunday. How. St. § 2015, provides: "No person shall keep open his shop, warehouse, or workhouse, or shall do any manner of labor, business, or work, or be present at any dancing, or at any public diversion, show, or entertainment, or take part in any sport, game, or play, on the first day of the week. The foregoing provisions shall not apply to works of necessity and charity, nor to the making of mutual promises of marriage, nor to the solemnization of marriages. And every person so offending shall be punished by fine not exceeding ten dollars for each offense." In Adams v. Hamell, 2 Doug. (Mich.) 73, 43 Am. Dec. 455, it was held by this court that a note made on Sunday was void, under the provisions of the statute of 1838, which are similar to the provisions of How. St., above quoted. In Tucker v. Mowrey, 12 Mich. 378, this court, approving Adams v. Hamell, said: "The statute not only makes it a penal offense, but takes away the legal capacity of the parties to make a contract on that day; and, whether

the supposed contract has been executed or remains executory, we think the rights of the parties are to be determined in the same manner as if no such contract had ever been made." The court below was in error in holding that the notes could be enforced here by reason of being made payable in Ohio. Parties cannot be allowed to defy our laws, and recover upon a contract void from its inception under our statute, by making the place of payment out of the state. It is an elementary principle that one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction. 7 Wait, Act. & Def. p. 114; Myers v. Meinrath, 101 Mass. 366, 3 Am. Rep. 371. The judgment must be reversed, and a new trial ordered. The other justices concurred.[21]

BROWN v. GATES.

(Supreme Court of Wisconsin, 1903. 120 Wis. 349, 97 N. W. 221, 98 N. W. 205.)

This action is brought by plaintiffs as copartners to recover on two notes made by defendant, each of $5,000, with interest, dated January 12, 1895, payable to plaintiffs, or order, on or before 18 months after date at their office in Boston, Mass. The defendant admits the making of the notes, and that there was a manual tradition of the same. He avers, however, that the notes were in fact made, executed and delivered on Sunday, January 13, 1895, under a parol agreement whereby it was understood that the notes were to have no validity until he realized in cash on his interest in the lands which were the subject-matter of the transactions through which the notes came into existence. The action was tried before a jury, which rendered a special verdict on the disputed facts in the case. The undisputed facts in the case are that plaintiffs at the date of the notes were the owners of a large tract of Florida land, for which defendant procured one John Paul as prospective purchaser before these notes were made. On January 10, 1895, plaintiff Brown and defendant met, pursuant to an arrangement, at a hotel in the city of New York, with the view of consummating a sale of these lands to John Paul, who met with them on the following day. The negotiations resulted in an agreement that Paul should purchase the lands. This agreement was reached on Saturday, January 12th, and consummated on the following Monday. It is averred that it was a condition of this transfer to Mr. Paul that the defendant should retain a one-sixth interest in the lands. It is not disputed but that Brown and defendant, made some arrangements pertaining to this transaction, resulting in the

[21] Accord: Brown v. Browning, 15 R. I. 422, 7 Atl. 403, 2 Am. St. Rep. 908 (1886). Compare Western Union Telegraph Co. v. Way, 83 Ala. 542, 4 South. 844 (1887).

notes in question being made on Sunday, January 13th. Among other facts the jury found that the notes were delivered to Brown for plaintiffs in the city of New York on this Sunday. Upon the verdict, judgment was rendered in plaintiffs' favor for the full amount, with costs, with some condition as to its enforcement. From this judgment both parties appeal.

SIEBECKER, J. The defendant avers that the notes sued on by plaintiffs were executed and delivered on Sunday, and are therefore void in law. As stated, there is no dispute but that the notes were signed by defendant on Sunday, January 13, 1895. The jury found they were delivered to plaintiffs on the same day. For this reason defendant contends they are void in plaintiffs' hands. Courts have refused to maintain actions on contracts when made in violation of statutes for the observance of Sunday, and have declared them void as between the parties. Hill v. Sherwood, 3 Wis. 343; Troewert v. Decker, 51 Wis. 46, 8 N. W. 26, 37 Am. Rep. 808; Ainsworth v. Williams, 111 Wis. 17, 86 N. W. 551; Cranson v. Goss, 107 Mass. 439, 9 Am. Rep. 45. The question, then, arises, were these notes made in violation of the law which prohibits the making of such contracts on Sunday? This presents an inquiry as to the place of contract of these notes. It is the general rule at common law that personal contracts are to be deemed contracts of the state or country where they are actually made. A well-established exception occurs, however, when a contract declares specifically, or it appears by implication, that it is to be performed or paid in another state or country. Then its validity, nature, obligation, and effect is to be governed by the law of the place of payment or performance. The grounds of this exception are that the presumed intention of the parties is that it shall be deemed to be a contract of the place of payment or performance, unless such presumption is rebutted by the facts and circumstances surrounding the making and the performance or payment. Under such circumstances the fact that notes are made payable at the place of the domicile of the payee is held to be very persuasive evidence of the intention of the parties that it was to be a contract of the place of payment. The intention thus expressed has been commonly held so conclusive in its effect that it must prevail unless it is made to appear that it would invalidate the contract, and that the parties intended to avoid such a result. Of the many authorities in support of these principles, the following may be cited: Bartlett v. Collins, 109 Wis. 477, 85 N. W. 703, 83 Am. St. Rep. 928; Shores Lumber Co. v. Stitt, 102 Wis. 450, 78 N. W. 562; Hill v. Spear, 50 N. H. 253, 9 Am. Rep. 205; Sondheim v. Gilbert, 117 Ind. 71, 18 N. E. 687, 5 L. R. A. 432, 10 Am. St. Rep. 23; Dickinson v. Edwards, 77 N. Y. 573, 33 Am. Rep. 671; Story's Conflict of Laws, §§ 278a, 280; Daniel, Negotiable Instruments, § 865; Wood's Byles on Bills & Notes, p. 570. This conclusion in no way militates against the decision of this court in Newman v. Kershaw, 10 Wis. 333. In

that case it was held that the place of payment as evidence of the intention of the parties that the law of that place is to govern was overcome by the actual facts and circumstances of the case. An examination of the case will show a marked difference in the facts of the two cases. In the instant case we have an incidental meeting of the maker and payee of the notes in the city of New York, one of whom is domiciled in Massachusetts and the other in Wisconsin; the subject-matter of the contract out of which these notes arose being a sale and transfer of real estate situated in the state of Florida. No money was received or paid by either at the time the notes were executed. All further acts or dealings required by the contracts were to be performed in the state of Massachusetts. From these facts the conclusion must follow that the place of the contract is the state of Massachusetts, and its laws govern. By the law of Massachusetts all executory contracts for the payment of money, including bonds and promissory notes, made and delivered on Sunday, are void as between the parties. Supp. Pub. St. Mass. 1889–1895; Cranson v. Goss, 107 Mass. 439, 9 Am. Rep. 45, and cases cited; Commonwealth v. De Voe, 159 Mass. 101, 34 N. E. 85. Defendant's contention concerning the jurisdiction of the court under the legislation embodied in chapters 1 (page 1) and 446 (page 738), Laws Wis. 1903, need not be considered for the reason that, if this legislation be invalid as claimed, the case must be held as pending in the superior court, and, on the other hand, if valid, the provisions of these acts cover this case, and the court properly proceeded to a final determination of the cause. From the foregoing it follows that the judgment must be reversed, and the action be dismissed. No necessity, therefore, arises for considering any of the other questions argued on the appeal of either the plaintiffs or defendant.

Judgment of the superior court is reversed on defendant's appeal, and the cause is remanded, with directions to enter judgment dismissing the complaint. Plaintiffs to take nothing on their appeal.

RICHARDSON v. ROWLAND.

(Supreme Court of Errors of Connecticut, 1873. 40 Conn. 565.)

FOSTER, J.[22] The only point presented by the finding for our consideration is, whether the plaintiff is entitled, upon the facts found, to recover one-half of the sum of $468.53, the amount received by the defendant as the net avails of his suit against Sturges. The plaintiff claims one-half of this sum under a contract with the defendant by which he was to render him certain services in connection with the suit, and receive half the net amount recovered; the defendant

[22] A part of the opinion only is given.

resists the demand, claiming that the contract is void for maintenance and champerty. * * *

The contract between these parties, however, was in regard to a suit pending in the state of New York; the property attached was there situate; the services to be performed were to be performed there; and the money to be recovered, if recovered at all, was there to be recovered. The contract, in short, was to be performed in the state of New York. The law of New York, therefore must necessarily govern the contract. Commonwealth of Kentucky v. Bassford, 6 Hill (N. Y.) 526. It becomes quite unnecessary to decide what the law of Connecticut, or of other states, may be on the subject of champerty and maintenance.[23] * * *

AKERS v. DEMOND.

(Supreme Judicial Court of Massachusetts, 1869. 103 Mass. 318.)

WELLS, J.[24] The defence to this suit is, that the bills of exchange are void for usury, under the laws of New York, where they were first negotiated. The statute of New York, Rev. St. (7th Ed.) pt. 2, c. 4, tit. 3, § 5, declares such securities void "whereupon or whereby there shall be reserved or taken or secured, or agreed to be reserved or taken," a greater rate of interest than seven per cent. The superior court ruled that, upon the testimony offered, no defence was established; and instructed the jury to return a verdict for the plaintiffs. The testimony is reported for our consideration, so far as admissible and competent, subject to the several objections made thereto by the plaintiffs. * * *

The testimony thus held to be admissible and competent tends to prove that the bills in suit were drawn by Reed and indorsed by William H. Russell, the payee, in New York, and accepted by the defendant in Boston, being upon their face addressed to him there. Both the acceptance and the indorsement were for the accommodation of Reed. The possession of collateral security, whether subsequent or at the time, does not change the character of the acceptance or the relations of the parties. Dowe v. Schutt, 2 Denio (N. Y.) 621. After the return of the acceptances to Reed, by an arrangement between him and the nominal payee, the latter procured the bills to be discounted by the plaintiffs, at the rate of one and a half per cent. a month. The proceeds of one of the bills were retained by William H. Russell, the payee, as a loan from Reed, and the proceeds of the other handed over by him to Reed.

[23] Accord: Grell v. Levy [1864] 16 C. B. N. S. 73 (semble). Compare: Blackwell v. Webster (C. C.) 29 Fed. 614 (1886).

[24] The statement of facts and a part of the opinion have been omitted.

As the case is now presented, in the absence of controlling testimony on the part of the plaintiffs, the foregoing statement must be taken as the result of the evidence. It shows that the transaction by which the plaintiffs became holders of the bills was the original negotiation of the paper; a loan upon discount, and not a mere sale of the bills. They are therefore open to the defence of usury. This is so clearly shown to be the law of New York, by the decisions of the courts of that state referred to in Ayer v. Tilden, 15 Gray, 178, 77 Am. Dec. 355, as to require no further citations.

The defendant is entitled to set up the usury, although not paid by himself, and although the loan was not made to him nor on his account. Van Schaack v. Stafford, 12 Pick. 565; Dunscomb v. Bunker, 2 Metc. 8; Cook v. Litchfield, 5 N. Y. 279; Clark v. Sisson, 22 N. Y. 312.

The difficult question in the case arises from the fact that the paper was made payable in Boston. It is contended that the contract of the acceptor is to be governed by the laws of the place where the bills are made payable. The general principle is, that the law of the place of performance is the law of the contract. This rule applies to the operation and effect of the contract, and to the rights and obligations of the parties under it. But the question of its validity, as affected by the legality of the consideration, or of the transaction upon which it is founded, and in which it took its inception as a contract, must be determined by the law of the state where that transaction was had. No other law can apply to it. Usury, in a loan effected elsewhere, is no offence against the laws of Massachusetts. In a suit upon a contract founded on such a loan, the penalty for usury could not be set up in defence, under the statutes formerly in force in this Commonwealth. Neither can a penalty, as a partial defence, authorized by the laws of one state, be applied or made effective in the courts of another state. Gale v. Eastman, 7 Metc. 14. Such penal laws can be administered only in the state where they exist. But when a usurious or other illegal consideration is declared by the laws of any state to be incapable of sustaining any valid contract, and all contracts arising therefrom are declared void, such contracts are not only void in that state, but void in every state and everywhere. They never acquire a legal existence. Contracts founded on usurious transactions in the state of New York are of this character. Van Schaack v. Stafford, 12 Pick. 565; Dunscomb v. Bunker, 2 Metc. 8. The fact that the bills now in suit were accepted in Boston and were payable there does not exempt them from this operation of the laws of New York. They were mere "nude pacts," with no legal validity or force as contracts, until a consideration was paid. The only consideration ever paid was the usurious loan made by these plaintiffs in New York. That then was the legal inception of the alleged contracts. Little v. Rogers, 1 Metc. 108; Cook v. Litchfield, 5 N. Y. 279; Clark v. Sisson, 22 N. Y. 312; Aeby v. Rapelyea, 1 Hill

(N. Y.) 371. By the statutes of New York, that transaction was incapable of furnishing a legal consideration; and, so far as the bills depend upon that, they are absolutely void. The original validity of such a contract must be determined by the law of the state in which it is first negotiated or delivered as a contract. Hanrick v. Andrews, 9 Port. (Ala.) 9; Andrews v. Pond, 13 Pet. (U. S.) 65, 10 L. Ed. 61; Miller v. Tiffany, 1 Wall. (U. S.) 298, 17 L. Ed. 540; Lee v. Selleck, 33 N. Y. 615.

There is no pretence that a discount of one and a half per cent. a month was justifiable by reason of any added exchange between New York and Boston; nor that it was otherwise than usurious, if any amount of charge upon paper payable elsewhere than in New York would be usurious there. It has often been held, in states where restrictions upon the rate of interest are maintained, that it is not usury to charge upon negotiable paper whatever is the lawful rate of interest at the place where the paper is payable, although greater than the rate allowable where the negotiation takes place. But if the paper is so made for the purpose of enabling the larger rate to be taken, or the greater rate is received with intent to evade the statutes relating to usury, and not in good faith as the legitimate proceeds of the contract, it is held to be usury. So also, if a greater rate is taken than is allowed by the law of either state, it is usury. Such a rate necessarily implies an intent to disregard the statutes restricting interest. Andrews v. Pond, 13 Pet. (U. S.) 65, 10 L. Ed. 61; Miller v. Tiffany, 1 Wall. (U. S.) 298, 17 L. Ed. 540. The legal rate of interest or discount in Massachusetts is six per cent. per annum; and, at the date of the negotiation of these bills, a greater rate than six per cent. was usurious and unlawful.

It follows from these considerations, that, upon the evidence as it now stands upon the part of the defendant, the transaction, upon which alone the bills in suit must depend for a consideration to give them validity as contracts, was illegal, and such as, under the laws of New York, renders them utterly void. No action, therefore, can be maintained upon them in the courts of Massachusetts, unless the effect of this evidence be in some way overcome or controlled. The verdict for the plaintiff must be set aside and a new trial granted.

ANDREWS v. POND.

(Supreme Court of the United States, 1839. 13 Pet. 65, 10 L. Ed. 61.)

TANEY, C. J.[25] This case comes before the court upon a writ of error, directed to the judges of the Circuit Court for the Ninth Circuit and Southern District of Alabama.

The action was brought by the plaintiff, as indorsee, against the defendants, as indorsers of a bill of exchange, in the following words:

"Exchange for $7,287.78. New York, March 11, 1837.

"Sixty days after date of this first of exchange, second of same tenor and date unpaid, pay to Messrs. Pond, Converse & Wadsworth, or order, seven thousand two hundred and eighty-seven 78/100 dollars, negotiable and payable at the Bank of Mobile, value received, which place to the account of

"Your obedient servant, D. Carpenter.

"To Messrs. Sayre, Converse & Co., Mobile, Alabama."

The case, as presented by the record, appears to be this: The defendants were merchants, residing in Mobile, in the state of Alabama. H. M. Andrews & Co. were merchants, residing in New York; and, before the above-mentioned bill was drawn, the defendants had become liable to H. M. Andrews & Co., as indorsers upon a former bill for $6,000, drawn by E. Hendricks on Daniel Carpenter, of Montgomery, Alabama. The last-mentioned bill was dated at New York, and fell due on the 21st of February, 1837, and was protested for nonpayment. The defendant, Pond, it seems, was in New York, in the month of March, 1837, shortly after this protest, when H. M. Andrews & Co. threatened to sue him on the protested bill; and the defendant, Pond, rather than be sued in New York, agreed to pay H. M. Andrews & Co. ten per cent. damages on the protested bill, and ten per cent. interest and exchange on a new bill to be given, besides the expenses on the protested bill.

According to this agreement an account, which is given in the record, was stated between them on the 11th of March, 1837, in which the defendants were charged with the protested bill, and ten per cent. damages on the protest, and interest and expenses, which amounted altogether to the sum of $6,625.25, and ten per cent. upon this sum was then added, as the difference of exchange between Mobile and New York, which made the sum of $7,287.78; for which the defendant, Pond, delivered to H. M. Andrews & Co. the bill of exchange, upon which this suit is brought, indorsed by the defendants in blank, The bill was remitted by H. M. Andrews & Co. to S. Andrews, at Mobile, for collection. The drawees refused to accept it, and it was protested for nonacceptance; and, after this refusal and protest, it

[25] The statement of facts and a part of the opinion have been omitted.

was transferred by S. Andrews to J. J. Andrews, the present plaintiff. It is stated in the exception that, after this transfer, it was a cash credit in the account between H. M. Andrews & Co. and S. Andrews. The bill was not paid at maturity, and this suit is brought to recover the amount.

There is no question between the parties as to the principal or damages of ten per cent. charged for the protested bill of $6,000; nor as to the interest and expenses charged in the account hereinbefore mentioned. The defendants admit that the principal amount of the protested bill, the damages on the protest which are given by the act of assembly of New York, and the interest and expenses, were properly charged in the account. The sum of $6,625.25 was, therefore, due from them to H. M. Andrews & Co., on the day of the settlement, payable in New York. The dispute arises on the item of $662.-53, charged in the account as the difference of exchange between New York and Mobile, and which swelled the amount for which the bill was given, to $7,287.78. The defendants allege that the ten per cent. charged as exchange, was far above the market price of exchange at the time the bill was given, and that it was intended as a cover for usurious interest exacted by the said H. M. Andrews & Co., as the price of their forbearance for the sixty days given to the defendants. This was their defence in the Circuit Court, where a verdict was found for the defendants, under the directions given by the court. * * *

Another question presented by the exception, and much discussed here is, whether the validity of this contract depends upon the laws of New York or those of Alabama. So far as the mere question of usury is concerned, this question is not very important. There is no stipulation for interest apparent upon the paper. The ten per cent. in controversy is charged as the difference in exchange only, and not for interest and exchange. And if it were otherwise, the interest allowed in New York is seven per cent., and in Alabama eight; and this small difference of one per cent. per annum, upon a forbearance of sixty days, could not materially affect the rate of exchange, and could hardly have any influence on the inquiry to be made by the jury. But there are other considerations which make it necessary to decide this question. The laws of New York make void the instrument when tainted with usury; and if this bill is to be governed by the laws of New York, and if the jury should find that it was given upon an usurious consideration, the plaintiff would not be entitled to recover; unless he was a bona fide holder, without notice, and had given for it a valuable consideration; while, by the laws of Alabama, he would be entitled to recover the principal amount of the debt, without any interest.

The general principle in relation to contracts made in one place to be executed in another, is well settled. They are to be governed by the law of the place of performance; and if the interest allowed by the laws of the place of performance, is higher than that permitted

at the place of the contract, the parties may stipulate for the higher interest, without incurring the penalties of usury. And in the case before us, if the defendants had given their note to H. M. Andrews & Co., for the debt then due to them, payable at Mobile, in sixty days, with eight per cent. interest, such a contract would undoubtedly have been valid; and would have been no violation of the laws of New York, although the lawful interest in that state is only seven per cent. And if in the account adjusted at the time this bill of exchange was given, it had appeared that Alabama interest of eight per cent. was taken for the forbearance of sixty days given by the contract; and the transaction was in other respects free from usury; such a reservation of interest would have been valid and obligatory upon the defendants; and would have been no violation of the laws of New York.

But that is not the question which we are now called on to decide. The defendants allege that the contract was not made with reference to the laws of either state, and was not intended to conform to either. That a rate of interest forbidden by the laws of New York, where the contract was made, was reserved on the debt actually due; and that it was concealed under the name of exchange, in order to evade the law. Now if this defence is true, and shall be so found by the jury, the question is not which law is to govern in executing the contract; but which is to decide the fate of a security taken upon an usurious agreement, which neither will execute? Unquestionably, it must be the law of the state where the agreement was made, and the instrument taken to secure its performance. A contract of this kind cannot stand on the same principles with a bona fide agreement made in one place to be executed in another. In the last-mentioned cases the agreements were permitted by the lex loci contractus; and will even be enforced there, if the party is found within its jurisdiction. But the same rule cannot be applied to contracts forbidden by its laws and designed to evade them. In such cases, the legal consequences of such an agreement must be decided by the law of the place where the contract was made. If void there, it is void everywhere; and the cases referred to in Story's Conflict of Laws, 203, fully establish this doctrine.

In the case of De Wolfe v. Johnson, 10 Wheat. 383, 6 L. Ed. 343, this court held that the lex loci contractus must govern in a question of usury; although by the terms of the agreement the debt was to be secured by a mortgage on real property in another state. And the case of Dewar v. Span, 3 T. R. 425, shows with what strictness the English courts apply their own laws against usury to contracts made in England. In the case under consideration, the previous debt for which the bill was negotiated was due in New York; a part of it, that is to say, the damages on the protest of the first bill, were given by a law of that state; and the debt was then bearing the New York interest of seven per cent., as appears by the account before referred

to. And if in consideration of further indulgence in the time of payment, the parties stipulated for a higher interest, and agreed to conceal it under the name of exchange, the validity of the instrument, which was executed to carry this agreement into effect, must be determined by the laws of New York, and not by the laws of Alabama.

In this aspect of the case, another question arose in the trial in the circuit court. By the laws of New York, as they then stood, usury was no defence against the holder of a note or bill who had received it in good faith, and to whom it was transferred for a valuable consideration, and without notice of the usury. The present plaintiff claims the benefit of this provision. But upon the evidence in the case, it is very clear that he does not bring himself within it. The bill of exchange was protested for nonacceptance, while it was in the hands of S. Andrews, the agent of H. M. Andrews & Co., to whom it had been sent for collection; and this fact appeared on the face of the bill at the time it was transferred to the plaintiff. Now a person who takes a bill, which upon the face of it was dishonored, cannot be allowed to claim the privileges which belong to a bona fide holder without notice. If he chooses to receive it under such circumstances, he takes it with all the infirmities belonging to it; and is in no better condition than the person from whom he received it. There can be no distinction in principle between a bill transferred after it is dishonored for nonacceptance, and one transferred after it is dishonored for nonpayment; and this is the rule in the English courts, as appears by the case of Crossley v. Ham, 13 East, 498. Now it is evident, that no consideration passed between Carpenter, the drawer of the bill, and the defendants, who are the payers and indorsers. The bill was made and indorsed by the defendants, for the purpose of being delivered to H. M. Andrews & Co., in execution of the agreement for further indulgence. And if that agreement was usurious, then the bill in question was tainted in its inception; and that taint must continue upon it in the hands of the present plaintiff. * * *

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MILLER v. TIFFANY.

(Supreme Court of the United States, 1863. 1 Wall. 298, 17 L. Ed. 540.)

SWAYNE, J.[26] * * * The defence chiefly relied upon is usury. The result of our inquiry upon that subject must depend upon the lex loci that governs the contract.

Palmer and Wallace, the payees of the note, were the assignees of an insolvent firm, which did business under one name in New York, and under another at Cleveland, Ohio. Palmer resided at New York and Wallace at Cleveland. About $50,000 worth of the goods, covered

[26] The statement of facts, and a part of the opinion have been omitted.

by the assignment, were at the former city, and about $75,000 worth at the latter. The negotiation for the sale was commenced by Palmer and concluded by Wallace. The note is as follows: [His honor here read the mortgage note, already described.[27]] Miller lived in Indiana. The note and mortgage were executed in that state. The mortgaged premises are situated there. Wallace was present at the execution of the securities. They were transmitted to Palmer at New York, and the goods were thereupon shipped thence to Indiana. The note and mortgage have been assigned to the appellee.

We lay out of view the imputation upon Palmer and Wallace, of a fraudulent purpose to evade by shift or device the usury statute of Indiana or New York. It is wholly unsupported by the evidence. They were acting in a fiduciary character, and could have had no motive to engage in such a transaction. There is no reason to believe that such a conception entered into their minds. On the other hand, we are by no means satisfied that it was not the deliberate purpose of Miller, when the arrangement was made, to involve them in the toils of this defence, and if possible to escape with the goods without paying anything for them. Our business, however, is to ascertain and apply the law of the case. We shall not discuss the evidence bearing upon the ethics of his conduct.

"The general principle in relation to contracts made in one place to be performed in another is well settled. They are to be governed by the law of the place of performance, and if the interest allowed by the law of the place of performance is higher than that permitted at the place of contract, the parties may stipulate for the higher interest without incurring the penalties of usury." Andrews v. Pond, 13 Pet. 77, 78, 10 L. Ed. 61; Curtis et al. v. Leavitt, 15 N. Y. 92; Berrien v. Wright, 26 Barb. (N. Y.) 213. The converse of this proposition is also well settled. If the rate of interest be higher at the place of the contract than at the place of performance, the parties may lawfully contract in that case also for the higher rate. Depeau v. Humphreys, 8 Mart. (N. S.) 1; Chapman v. Robertson, 6 Paige (N. Y.) 634, 31 Am. Dec. 264.

These rules are subject to the qualification, that the parties act in good faith, and that the form of the transaction is not adopted to disguise its real character. The validity of the contract is determined

[27] The note was in these words:

"$20,000. Cleveland, O., February 22, 1850.

"Five years after date, for value received, I, George Miller, of Fort Wayne, Allen county, Indiana, promise to pay Courtland Palmer and Frederick Wallace, assignees, or their order, twenty thousand dollars, with interest at the rate of ten per centum per annum, payable semi-annually, after six months from the date hereof, and on failure to pay said interest when due, the whole of said note to become due and collectible; the above note, interest, and principal, negotiable and payable at the Commercial Branch Bank, Cleveland, Ohio, with the current rate of exchange on New York, and without relief from valuation or appraisement laws of the state of Indiana.

"George Miller."

by the law of the place where it is entered into. Whether void or valid there, it is so everywhere. Andrews v. Pond, 13 Pet. 78, 10 L. Ed. 61; Mix v. Madison Ins. Co., 11 Ind. 117; Corcoran v. Powers, 6 Ohio St. 19.

When these securities were executed the statute of Ohio of the 14th of March, 1850, upon the subject of interest, was in force. According to its provisions parties might lawfully contract for any rate of interest not exceeding ten per cent. per annum. The contract of Miller was therefore valid.

Decree affirmed with costs.

ARNOLD v. POTTER.

(Supreme Court of Iowa, 1867. 22 Iowa, 194.)

Mortgage foreclosure. Plaintiff is a resident of Massachusetts; defendant, a resident of Iowa. The real estate is situated in Lee county, Iowa. The mortgage or trust deed was acknowledged by defendant in Massachusetts and by his wife in Iowa. Love, the trustee, resided in Iowa and there accepted the trust. The notes secured by the mortgage were dated at Keokuk, in the state of Iowa, payable in New York to the order of one Baldwin, who indorsed them to plaintiff, in Iowa. The notes and the deed were delivered in Massachusetts, and the money was received there, pursuant to the agreement entered into when negotiating the loan. The defense was usury.[28]

WRIGHT, J.[29] * * * The general rule is well settled that the law of the place where the contract is made is to govern in enforcing and expounding it, unless the parties provide for its execution elsewhere, in which case it is to be governed by the law of the latter place.

The parties may, however, if it is made in one place to be executed in another, stipulate that it shall be governed by one or the other.

And on the subject of interest therefore, if the law of the one place differs from that of the other, it is competent for them to agree upon the rate in either locality, and thus, by their contract, determine the law which shall govern this incident thereof. Hence it has been held that a note made in this state with ten per cent. payable in New York, which declares void all contracts reserving more than seven per cent. would be maintained, as the parties thereby expressly stipulate for a rate of interest allowed by the place of making the contract. Butters v. Olds, 11 Iowa, 1; and see Cox v. United States, 6 Pet. (U. S.) 172, 8 L. Ed. 359; Smith v. Smith, 2 Johns. (N. Y.) 236, 3 Am. Dec. 410;

[28] This statement of facts has been substituted for that of the original report.

[29] A part of the opinion has been omitted.

Thompson v. Ketcham, 4 Johns. (N. Y.) 285; Gibbs v. Fremont, 20 Eng. L. & E. 555; Stewart v. Ellice, 2 Paige (N. Y.) 604; Berrien v. Wright, 26 Barb. (N. Y.) 208; Harvey v. Archibold, 1 Ry. & M. 184; Andrews v. Pond, 13 Pet. (U. S.) 65, 10 L. Ed. 61; Depau v. Humphreys, 8 Mart. (N. S.) 1; Van Schaick v. Edwards, 2 Johns. Cas. (N. Y.) 355; De Wolf v. Johnson, 10 Wheat. (U. S.) 367, 6 L. Ed. 343; Chapman v. Robertson, 6 Paige (N. Y.) 627, 31 Am. Dec. 264; Peck v. Mayo, 14 Vt. 33, 39 Am. Dec. 205; Story's Conflict of Laws, p. 296; 2 Kent. (3d Ed.) 460; 2 Parsons on Cont. 584, and note "h," where the authorities are very fully collected.

Another rule may be stated thus: Where the interest expressed is usurious both by the law of the place of making the contract and that where it is payable, the law of the former place will govern as to the consequence of the usury. Andrews v. Pond, supra; Mix v. Madison Ins. Co., 11 Ind. 117. And, therefore, if these notes were made in Massachusetts, payable in New York, being usurious under the laws of both states, the law of the first would govern.

The question, of more importance, however, arises upon the facts as claimed by appellee. The indorsee, and it may be admitted the real payee, resided in Massachusetts. The loan was negotiated there by the payor, a resident of this state. The notes were signed in Massachusetts, dated and indorsed here, and delivered there by the maker. The security was upon lands in this state, and though acknowledged by the defendant (the husband) there, it was executed by the wife here. The interest reserved is legal under our statute.

Plaintiff claims that the parties in good faith contracted with reference to the laws of this state, intending to make this an Iowa contract. And upon this subject the court instructed as follows: "If defendant went to Boston and urged the loan and promised ten per cent. under the laws of Iowa, and all the arrangements and contracts were made as to the laws of Iowa in good faith, and no more than ten per cent. was contracted for, then the defense fails and plaintiff can recover;" and also, "if the parties in good faith loaned and borrowed the money sued for, with a full understanding that the law of Iowa was to govern as to the interest, then the laws of New York and Massachusetts can have no influence here, but the understanding of the parties must prevail."

These instructions were based, of course, upon the facts claimed, as above set forth; and now the question is, do they contain the law?

Our opinion is that, if the parties acted in good faith, that is, if there was no intention to evade the law, it was competent for them to thus contract, and that the defense could not avail. In thus holding, we, of course, do not decide that two citizens of Massachusetts could make a contract in that state, payable there or in New York, agree to be governed by the laws of Iowa or California, and thereby avoid the consequences of the usury. Nor do we hold that a citizen of one

state could make his note in another to a resident there, payable in a third, with interest as allowed in a fourth. But what we do hold is that, if A., of Iowa, in good faith, borrows money of B., in Illinois, gives security on land in Iowa, and they, in good faith, agree that the law of Iowa shall govern; that a note given in pursuance of said contract in Illinois, bearing the interest allowed by our laws, would not be usurious.

While parties will not be allowed to evade the law, the question after all is, was the course adopted as a cover for usury?

The intention of the parties is always an important element, and should never be disregarded. To what place did the parties in good faith have reference, in negotiating the loan, may always be shown. We concede the proposition that, if the contract is made between the citizen of one state and the citizen of another, in the former, without any agreement or understanding, it is to be governed by the law of the place where made, or where it is to be executed, if still in another state. Story's Conflict of Laws, § 299; Smith v. Mead, 3 Conn. 253, 8 Am. Dec. 183; Jacks v. Nichols, 5 Barb. (N. Y.) 38.

But, in this concession, there is no abandonment of the position that the parties may, in good faith, contract with reference to the law of the place where the payor resides, and where the property upon which the security is taken is located. For there being, in the latter case, no attempt to evade the law, courts will not apply its penalties. The form of the transaction is nothing, the cardinal inquiry being, when the contract specifying the amount reserved is express, did the parties resort to it as the means of disguising the usury in violation of the laws of the state, where the contract was made or to be executed. And, in arriving at this intention, all of the facts are to be taken into consideration. Thus, in this case, the fact that the notes were dated in Iowa, made payable to the party here, and by him indorsed in this state; that the trustee resided here and in no other place could the security be made available; that the payor resided here; that he went to Massachusetts to negotiate the loan; and if, under these circumstances, the parties, in good faith, stipulated for the interest allowed here, the contract should be enforced. To hold otherwise would enforce forfeitures without reason, and extend unwarrantably the operation of penal statutes. Not only so, but it would be setting at naught the solemn agreements of parties, entered into with the best of motives, and when they have had no purpose of violating the laws of any state. Then, again, it would compel our courts to enforce the laws of other states, and hold parties to their penalties and consequences, when they have, in express terms, agreed to be governed by ours. Upon this subject, generally, see the following authorities: Thompson v. Paroles, 2 Sim. 194; Hosford v. Nichols, 1 Paige (N. Y.) 220; Chapman v. Robertson, 6 Paige (N. Y.) 627, 31 Am. Dec. 264; Berrien v. Wright, 26 Barb. (N. Y.) 208; Story's

Conflict of Laws §§ 293–296, and note 1; 3 Parsons on Cont. 114; Richards v. Globe Bank, 12 Wis. 692; Vliet v. Camp, 13 Wis. 198. * * *[30]

SHANNON v. GEORGIA STATE BUILDING & LOAN ASS'N.

(Supreme Court of Mississippi, 1901. 78 Miss. 955, 30 South. 51, 57 L. R. A. 800, 84 Am. St. Rep. 657.)

In September, 1895, Mrs. N. L. Shannon, the mother of appellant, borrowed from the Georgia State Building & Loan Association, of Savannah, Ga., the sum of $1,000, and to secure said loan she and her husband executed a deed of trust on certain property owned by her in the town of Ellisville, Miss., and, in further consideration of said loan, subscribed for 10 shares of stock in said association, at $100 per share, and received a certificate for said shares, which she indorsed in blank and delivered to the association as additional security for said loan. By the terms of the deed of trust, Mrs. Shannon was to pay $10 per month, or $120 per year, to the association as interest and fixed premium on said loan of $1,000, and monthly dues of 60 cents per share on said 10 shares of stock. From the date of said loan in October, 1895, until November, 1896, Mrs. Shannon promptly made the monthly payments to one Jesse M. Bush, the local secretary of the association at Ellisville, Miss. From October, 1896, to March 10, 1897, Charles R. Shannon advanced the payments for his mother. On the last-named date Charles R. Shannon purchased from his mother the property on which the association held the deed of trust. Charles R. Shannon continued to make his monthly payments to the local agent of the company at Ellisville, Miss., until March, 1899, at which time, by paying at different times certain amounts on the principal, he had paid off the indebtedness. After Charles R. Shannon had paid off the indebtedness to the association he instituted an attachment suit against said association,

[30]As to renewal notes, see Bowman v. Miller, 25 Grat. (Va.) 331, 18 Am. Rep. 686 (1874); Wayne County Sav. Bank v. Low, 81 N. Y. 566, 37 Am. Rep. 533 (1880); Staples v. Nott, 128 N. Y. 403, 28 N. E. 515, 26 Am. St. Rep. 480 (1891); Mott v. Rowland, 85 Mich. 561, 48 N. W. 638 (1891).

The mere fact that the note is secured by a mortgage upon real estate does not make the lex rei sitæ applicable to the question of usury. De Wolf v. Johnson, 10 Wheat. (U. S.) 367, 6 L. Ed. 343 (1825); Manhattan Life Ins. Co. v. Johnson, 188 N. Y. 108, 80 N. E. 658, 9 L. R. A. (N. S.) 1142 (1907).

Positive statutory provisions may, of course, modify the application of the ordinary rules with respect to usury. Fowler v. Equitable Trust Co., 141 U. S. 384, 12 Sup. Ct. 1, 35 L. Ed. 786 (1891).

As to defense of usury by the drawer or the indorser of a bill or note, see post, p. 437.

As to defense of usury by surety, see post, p. 416.

English Gaming Act 1835 (5 & 6 Wm. IV, c. 41) § 4, has been held applicable to a transaction in a foreign country. Moulis v. Owen, [1907] 1 K. B. (C. A.) 746. In this case a check, drawn upon England in the French colony of Algiers, where it was given for a gambling debt, was held invalid, though the consideration for it would be legal under French law.

and had writs of garnishment issued against certain parties in this state who are indebted to said association, to recover of it an alleged indebtedness of $351 due him as usurious interest paid by him to said association. On the trial of the cause in the court below a jury was waived, and by consent the case was submitted to the court, who rendered judgment in favor of defendant. From this judgment the plaintiff appeals.*

WHITFIELD, C. J.[31] It is thoroughly settled in this state, under facts like those in this record, that the appellant can recover the whole of the interest. McAlister v. Jerman, 32 Miss. 142; Chaffe v. Wilson, 59 Miss. 42. The appellant stood as a substituted debtor, and had all the rights the original debtor had. The premium in this case was fixed, and the contract was therefore usurious. See the case of Sokoloski, v. New South Building & Loan Ass'n, 77 Miss. 155–166, 26 South. 361.

The chief point of contention is whether this is a Georgia or a Mississippi contract. It is true, the notes were payable in Georgia; but the mortgage was on land in Mississippi, and the debtor lived in Mississippi, where alone the mortgage could have been enforced. All the payments through a series of years were actually made in Mississippi, instead of Georgia, to the local treasurer here, and it is manifest it was intended they should be made here. This foreign corporation had the power to organize local boards throughout Georgia and other states. It did organize a local board, thoroughly officered, at Ellisville, in this state; and to the local secretary and treasurer of this board all payments were made by the appellant and his vendor, and by other members of this association, through a series of years. It is obvious that this foreign corporation has thus localized its Mississippi business within the state of Mississippi. It is not a case of a nonresident money lender or a foreign corporation in a few isolated cases dealing with our citizens, and taking notes payable in the state of the domicile of such person or corporation. It is the case of a localization within this state of a large business done by a foreign corporation on the faith of mortgages on land in this state, the payments to be made to the secretary and treasurer of their respective local boards, scattered throughout the state. Wherever, under circumstances such as these, the foreign corporation thus localizing its business within this state has the payments made to the secretary or treasurer of a local board, the real intention of the parties is that the payments shall be made in this state, and the only purpose of reciting the contrary in the notes is to evade the usury laws of this state. The contract is a Mississippi contract, according to the real facts and the real intention of the parties. Courts look through all disguises to the real case made by the actual facts. * * *

*This statement has been taken from 30 South. 51.

[31]A part of the opinion has been omitted.

Our decision is rested upon the two distinct grounds: First, that where a foreign money-lending corporation has localized its business within this state through local boards, doing here regularly and continuously for years the business of the corporation, it has thus voluntarily domesticated itself within this state, and subjected its business and contracts to the operation of our laws; and, second, that where, in such case, all the facts, fairly weighed, show that the only purpose of a mere stipulation in the notes or mortgages for payment in the foreign state must have been to evade our laws on the subject of usury, no device or disguise or contrivance will prevent the courts from stripping off the mask, and pronouncing the judgment of the law on the real case made by the actual facts. * * *

The judgment is reversed, and cause remanded.[32]

EQUITABLE LIFE ASSUR. SOC. v. CLEMENTS.

(Supreme Court of the United States, 1891. 140 U. S. 226, 11 Sup. Ct. 822, 35 L. Ed. 497.)

GRAY, J.[33] Upon the question whether the contract sued on was made in New York or in Missouri, there is nothing in the record, except the policy and application, the petition and answer, by which the facts appear to have been as follows: The assured was a resident of Missouri, and the application for the policy was signed in Missouri. The policy, executed at the defendant's office in New York, provides that "the contract between the parties hereto is completely set forth in this policy and the application therefor, taken together." The application declares that the contract "shall not take effect until the first premium shall have been actually paid during the life of the person herein proposed for assurance." The petition alleges that that premium and two annual premiums were paid in Missouri. The answer expressly admits the payment of the three premiums, and, by not controverting that they were paid in Missouri, admits that fact also, if material. Rev. St. Mo. 1879, § 3545. The petition further alleges that the policy was delivered in Missouri; and the answer admits that the policy was, "at the request of the said Wall, transmitted to the state of Missouri, and was delivered to said Wall in said state." If this form of admission does not imply that the policy was at the request of Wall transmitted to another person, perhaps the company's agent,

[32] As to usury in general, see 62 L. R. A. 42-81; also Cyc. "Usury—What Law Governs."

CONTINENTAL LAW.—The ordinary rules have been held to apply also to the question of usury. In favor of the law of the place of making, see France, Cass. Feb. 19, 1890 (17 Clunet, 495); App. Bordeaux, Aug. 22, 1865 (S. 1866, 2, 217). In favor of the law of the place of performance, see Germany, 46 R. G. 112 (May 26, 1900).

[33] The statement of facts has been omitted.

in Missouri, and by him there delivered to Wall, it is quite consistent with such a state of facts; and there is no evidence whatever, or even averment, that the policy was transmitted by mail directly to Wall, or that the company signified to Wall its acceptance of his application in any other way than by the delivery of the policy to him in Missouri. Upon this record, the conclusion is inevitable that the policy never became a completed contract, binding either party to it, until the delivery of the policy and the payment of the first premium in Missouri; and, consequently, that the policy is a Missouri contract, and governed by the laws of Missouri.

By the Revised Statutes of Missouri of 1879, in force when this policy was made, it was enacted as follows: By section 5983, "no policy of insurance on life, hereafter issued by any life insurance company authorized to do business in this state, shall, after payment upon it of two full annual premiums, be forfeited or become void by reason of the nonpayment of premium thereon; but it shall be subject to the following rules of commutation, to wit." The net value of the policy is to be computed, and the insurance is to continue in force for the full amount of the policy for such time as three-fourths of such net value will be a premium for, according to the rules of commutation prescribed in that section. By section 5984, the holder of the policy, within 60 days from the beginning of such temporary insurance, may elect to take a paid-up policy for such amount as the net value aforesaid would be a premium for. By section 5985, if the assured dies within the term of temporary insurance, as determined by section 5983, and there has been no breach of any other condition of the policy, "the company shall be bound to pay the amount of the policy, the same as if there had been no default in the payment of premium, anything in the policy to the contrary notwithstanding." The manifest object of this statute, as of many statutes regulating the form of policies of insurance on lives or against fires, is to prevent insurance companies from inserting in their policies conditions of forfeiture or restriction, except so far as the statute permits. The statute is not directory only, or subject to be set aside by the company with the consent of the assured; but it is mandatory, and controls the nature and terms of the contract into which the company may induce the assured to enter. This clearly appears from the unequivocal words of command and of prohibition above quoted, by which, in section 5983, "no policy of insurance" issued by any life insurance company authorized to do business in this state "shall, after the payment of two full annual premiums, be forfeited or become void, by reason of the nonpayment of premium thereon, but it shall be subject to the following rules of commutation;" and, in section 5985, that if the assured dies within the term of temporary insurance, as determined in the former section, "the company shall be bound to pay the amount of the policy," "anything in the policy to the contrary notwithstanding." This construction is put beyond doubt by section 5986, which, by specifying

four cases (two of which relate to the form of the policy) in which the three preceding sections "shall not be applicable," necessarily implies that those sections shall control all cases not so specified, whatever be the form of the policy. Of the cases so specified, the only ones in which the terms of the policy are permitted to differ from the plan of the statute are the first and second, which allow the policy to stipulate for the holder's receiving the full benefit, either in cash, or by a new paid-up policy, of the three-fourths of the net value, as determined by sections 5983 and 5984. The other two cases specified do not contemplate or authorize any provision in the contract itself inconsistent with the statute; but only permit the holder to surrender the policy, either in lieu of a new policy, or for a consideration adequate in his judgment. In defining each of these two cases, the statute, while allowing the holder to make a new bargain with the company, at the time of surrendering the policy, and upon such terms as, on the facts then appearing, are satisfactory to him, yet significantly, and, it must be presumed, designedly, contains nothing having the least tendency to show an intention on the part of the Legislature that the company might require the assured to agree in advance that he would at any future time surrender the policy, or lose the benefit thereof, upon any terms but those prescribed in the statute. It follows that the insertion in the policy of a provision for a different rule of commutation from that prescribed by the statute in case of default of payment of premium after three premiums have been paid, as well as the insertion in the application of a clause by which the beneficiary purports to "waive and relinquish all right or claim to any other surrender value than that so provided, whether required by a statute of any state or not," is an ineffectual attempt to evade and nullify the clear words of the statute.

Judgment affirmed.[34]

[34] See, also, Mutual Life Ins. Co. v. Cohen, 179 U. S. 262, 21 Sup. Ct. 106, 45 L. Ed. 181 (1900); Mutual Life Ins. Co. v. Hill, 193 U. S. 551, 24 Sup. Ct. 538, 48 L. Ed. 788 (1904).

As to insurance contracts in general, see 63 L. R. A. 833–869, and 104 Am. St. Rep. 483–492; and as to their interpretation in particular, The London Assurance v. Companhia De Moagens Do Barreiro, 167 U. S. 149, 17 Sup. Ct. 785, 42 L. Ed. 113 (1897); Knights Templars' & Masonic Mut. Aid Ass'n v. Green (C. C.) 79 Fed. 461 (1897); Mullen v. Reed, 64 Conn. 240, 29 Atl. 478, 24 L. R. A. 664, 42 Am. St. Rep. 174 (1894); Burns v. Burns, 82 N. E. 1107 (1907).

AGREEMENTS RELATING TO JURISDICTION OF COURTS OR TO ARBITRATION.—a. *England and the United States.*—Stipulations that future controversies shall be submitted to arbitration or shall be litigated in a certain court are deemed illegal and void in this country, and will not be enforced, even though they be valid under the law of the place where such stipulation was made. See 8 Col. Law Rev. 409. See, also, Addison C. Burnham, Arbitration as a Condition Precedent. 11 Harv. Law Rev. 234–248; G. B. Slaymaker, The Legality of Contracts Affecting the Jurisdiction of Courts, 58 Central Law Journal, 64–66. Agreements with reference to arbitration have become practically enforceable in England since the arbitration act of 1889. See Wald's Pollock (Williston's Ed.) on Contracts, 445–449.

b. *Continental Countries.*—1. *Stipulations Relating to Jurisdiction of*

SORTWELL v. HUGHES.

(Circuit Court, District of New Hampshire, 1852. 1 Curt. 244, Fed. Cas. No. 13,177.)

This is an action for goods sold and delivered [by Daniel R. Sortwell and others against Peter Hughes]. An auditor, appointed by consent of parties, having made a report, it was agreed that his report should be taken to be a statement of facts. The material facts found by him were, that the defendant was engaged, at Dover, N. H., in the sale of spirituous liquors without a license; that one of the plaintiffs, being from time to time at the defendant's place of business in Dover, received verbal orders from him for these liquors, promised to send them to him, and on his return to Boston, did deliver them, either at the Boston & Maine Railroad, or on board some vessel, consigned to the defendant, at Dover, who, upon their reception, paid the freight. One parcel was ordered by the defendant, personally, in Boston, and sent in the same manner as the others.

CURTIS, Circuit Justice.[35] The statute law of New Hampshire, in force when these transactions took place, inflicted a penalty upon any person, not licensed, who should sell any spirituous liquor or wine.

Courts.—Such stipulations are allowed in France, and will be enforced, although the jurisdiction of French courts is thereby ousted. Cass. Aug. 13, 1879 (D. 1880, 1, 85); Cass. Feb. 29, 1888 (D. 1888, 1, 483). Contra: Italy, App. Bologna, Nov. 10, 1905 (35 Clunet, 249). According to German law parties may agree that a court having jurisdiction according to German law shall have exclusive jurisdiction over any controversy that may arise from a given contract. R. G. Feb. 18, 1895 (6 Niemeyer, 173).

2. *Stipulations Relating to Arbitration.—France.*—According to French municipal law such a stipulation is valid only if the arbitrators and the subject-matter are named in the arbitration agreement. Article 1006, Code Civ. Proc. But an agreement for arbitration, entered into abroad and valid where made, will be enforced in France, though it does not conform to the requisites of French law Cass. June 21, 1904 (S. 1906, 1, 22): Cass. July 26, 1893 (D. 1894, 1, 215); App. Paris, April 10, 1894 (21 Clunet, 878); App. Poitiers, Oct. 28, 1907 (4 Darras, 222). And the award will be enforced in the same way as an award made under French law. App. Douai, Dec. 10, 1901 (30 Clunet, 809); App. Toulouse, May 22, 1901 (28 Clunet, 965). Some courts apply, however, the rules governing the enforceability of foreign judgments. App. Paris, Dec. 10, 1901 (29 Clunet, 314). *Italy.*—According to Italian municipal law, the agreement for arbitration must provide for a submission of the controversy to an uneven number of arbitrators (article 8, Code Civ. Proc.), and the award must be rendered in Italy (article 22, Code Civ. Proc.). Both of these conditions are held to be rules concerning public order; hence no stipulation for arbitration, made in a foreign country and valid where made, will be enforced or recognized in Italy without a compliance with such conditions. Cass. Turin, June 3, 1907 (35 Clunet, 248); App. Genoa, Jan. 9, 1905, March 6, 1906, March 16, 1906 (34 Clunet, 193). *Germany.*—A foreign award, being based, not upon the judgment of a court, but upon the agreement of the parties, will be enforced, irrespective of the question of reciprocity. R. G. Sept. 28, 1895 (51 Seuffert's Archiv, 159). And its validity (semble) is to be determined exclusively by the law applicable to the arbitration agreement itself. R. G. April 30, 1901 (11 Niemeyer, 445); R. G. Sept. 17, 1901 (11 Niemeyer, 448).

[35] A part of the opinion has been omitted.

The first question is, whether the sales, for which this action was brought, were made in the state of New Hampshire. If they were not, that statute, which can have no extraterritorial operation, did not subject the plaintiffs to any penalty. A sale has been defined to be, "a transmutation of property from one man to another, in consideration of some price, or recompense in value." 2 Bl. Comm. 446. Was enough done between these parties, in the state of New Hampshire, to pass this property to the defendant? In the first place, it does not appear that the orders given by the defendant, and assented to by the plaintiff, in New Hampshire, pointed to any particular casks or packages. The kind, the quantity, and the price, are all the particulars found by the auditor to have been agreed on. It remained for the vendors, after the return of one of the plaintiffs to Boston, to fix on the particular liquors to be sent to answer the order, either by separating them from larger quantities, or by designating and setting apart particular casks or packages. Indeed, it does not appear that the liquors actually sent were even owned by the plaintiffs when the orders were given. Besides, under the statute of frauds, the oral contract of sale was not sufficient to pass the property. It is true it passed afterwards, by the delivery to the carrier, that mode of delivery being the one found by the auditor to have been agreed on by the parties. Hart v. Sattley, 3 Camp. 528. But this act was done in Massachusetts.

To test this question, suppose the plaintiffs had been indicted in New Hampshire for violating this penal law, and the jury had found specially the facts reported by the auditor, it seems to me the plaintiffs could not have been convicted, because it would not appear that a complete sale had been made in the state of New Hampshire. I am aware that there is a decision by a highly respectable court, Territt v. Bartlett, 21 Vt. 184, that a similar statute in the state of Vermont was violated by acts not distinguishable from those in the case at bar. If this had been so decided in New Hampshire, by the highest court of law, I might have felt bound to yield to the exposition of a statute of that state, by that court. But I cannot construe a penal statute, which punishes a sale, so broadly, as to hold, that it applies to a mere executory contract for a sale. In my judgment, it extends only to executed sales, by which the property passes from the vendor to the vendee; and, in the absence of any decision to the contrary in New Hampshire, I must so hold in this case. And if the acts done in New Hampshire were not sufficient to subject the plaintiffs to a penalty, there is no implication that those acts are forbidden by statute; and so there is no ground to argue that, for this cause, the action cannot be sustained. I understand the doctrine of the highest court of law in New Hampshire to be, that if a penalty is affixed to an act, this carries with it an implication that the act itself is forbidden; and if forbidden, it cannot be the ground of an action. But if what was done, in this case, at Dover, is not by implication forbidden, and if what was done at Boston cannot be within any statute of New Hampshire, the cases decided in that state

can have no application. Pray v. Burbank, 10 N. H. 377; Lewis v. Welch, 14 N. H. 294; Caldwell v. Wentworth, 14 N. H. 431.

[The learned justice thereupon proceeded to show that mere knowledge on the part of plaintiffs that the defendant intended to sell the property in violation of the law of New Hampshire did not prevent a recovery.] [36]

FLAGG v. BALDWIN.

(Court of Errors and Appeals of New Jersey, 1884. 38 N. J. Eq. 219, 48 Am. Rep. 308.)

The bill in this case was filed for the foreclosure of a mortgage upon lands in New Jersey given to secure the payment of appellants' bond. The main defense was that the contracts out of which the bond and mortgage arose were wagering contracts, and illegal and void, and that they could, therefore, not be enforced. The transactions prior to the execution of the bond in mortgage took place wholly within the state of New York, and the contracts in question were made and were to be performed there. It was averred in the bond and mortgage that the

[36] Accord: Hill v. Spear, 50 N. H. 253, 9 Am. Rep. 205 (1870).

As to the law governing sales of intoxicating liquors, see 15 L. R. A. 836–837, and 61 L. R. A. 417–434; and as to place of sale in particular, Brown v. Wieland, 116 Iowa, 711, 89 N. W. 17, 61 L. R. A. 417 (1902), and Webber v. Howe, 36 Mich. 150, 24 Am. Rep. 590 (1877).

No recovery can be had if the soliciting of orders within the state is expressly prohibited by statute. Jones v. Surprise, 64 N. H. 243, 9 Atl. 384 (1887). [In Durkee v. Moses, 67 N. H. 115, 23 Atl. 793 (1892), it was held that the New Hampshire statute was unconstitutional, as it regulated commerce among the states.] In Vermont this result seems to have been reached without express statutory enactment. Starace v. Rossi, 69 Vt. 303, 37 Atl. 1109 (1897); Beverwick Brewing Co. v. Oliver, 69 Vt. 323, 37 Atl. 1110 (1897).

If the vendor actively participates in the unlawful purpose, no action will lie. Gaylord v. Soragen, 32 Vt. 110, 76 Am. Dec. 154 (1859). And it has been held that an action would not lie, where the sale was made with knowledge of the seller that the liquor was to be resold by the purchaser in another state contrary to its law and with a view to such resale. Graves v. Johnson, 156 Mass. 211, 30 N. E. 818, 15 L. R. A. 834, 32 Am. St. Rep. 446 (1892). Under an express statute such action has been denied to a vendor who neither participated in the illegal intent of the purchaser nor had any knowledge of such intent. Corbin v. Houlehan (Me.) 61 Atl. 131 (1905); Boehm v. Allen, 102 Me. 217, 66 Atl. 474 (1906).

As to law applicable to sales in general, see 64 L. R. A. 823–833.

The law of the place where the executed contract of sale was made has been applied to determine the right of rescission on the ground of fraud, Kline v. Baker, 99 Mass. 253 (1868); what constitutes "merchantable quality," Ladd v. Dulany, Fed. Cas. No. 7,971 (1809); the right to maintain an action for the purchase price before the expiration of the term of credit, Jaffray v. Wolf, 4 Okl. 303, 47 Pac. 496 (1896); and the existence of a vendor's lien, McIlvaine v. Legaré, 36 La. Ann. 359 (1884). The lien may not be recognized with respect to local creditors or purchasers after the removal of the property to a state under the law of which such a lien does not exist. Barney & Smith Mfg. Co. v. Hart, 8 Ky. Law Rep. 223, 1 S. W. 414 (1886). See, also, Tyree v. Sands, 24 La. Ann. 363 (1872).

As to vendor's right of stoppage in transitu, see Inglis v. Usherwood, 1 East, 515 (1801).

parties resided, also, in that state. The mortgagee did in fact reside there, and the mortgage was acknowledged there. The delivery of the papers was made and the remaining transactions took place in New York. There was no proof as to the law of New York with respect to wagering contracts.[37]

MAGIE, J.[38] [After holding that the contracts were wagering contracts, to be governed as to their validity by the law of New York, and that in the absence of proof the common law must be deemed to prevail in New York with respect to such contracts, under which they would be unobjectionable, the learned justice continued as follows:]

The enforcement of a foreign law and contracts dependent thereon for validity, within another jurisdiction and by the courts of another nation, is not to be demanded as a matter of strict right. It is permitted, if at all, only from the comity which exists between states and nations. Every independent community must judge for itself how far this comity ought to extend. Certain principles are well-nigh universally recognized as governing this subject. It is everywhere admitted that a contract respecting matter malum in se, or a contract contra bonos mores, will not be enforced elsewhere, however enforceable by the lex loci contractus. An almost complete agreement exists upon the proposition that a contract valid where made will not be enforced by the courts of another country, if, in doing so, they must violate the plain public policy of the country whose jurisdiction is invoked to enforce it, or if its enforcement would be injurious to the interest or conflict with the operation of the public laws of that country. Story's Confl. Laws, § 244; 1 Addison, Cont. § 241; Forbes v. Cochrane, 2 B. & C. 448; Grell v. Levy, 16 C. B. (N. S.) 73; Hope v. Hope, 8 De G., M. & G. 731; 2 Kent's Com. 475; Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 10 L. Ed. 274; Ogden v. Saunders, 12 Wheat. (U. S.) 213, 6 L. Ed. 606; Blanchard v. Russell, 13 Mass. 1, 7 Am. Dec. 106. This proposition has been announced and applied in our own state. Varnum v. Camp, 13 N. J. Law, 326, 25 Am. Dec. 476; Frazier v. Fredericks, 24 N. J. Law, 162; Moore v. Bonnell, 31 N. J. Law, 90; Bentley v. Whittemore, 19 N. J. Eq. 462, 97 Am. Dec. 671; Watson v. Murray, 23 N. J. Eq. 257; Union Locomotive & Express Co. v. Erie R. Co., 37 N. J. Law, 23.

Since the courts of each state must, at least in the absence of positive law, determine how far comity requires the enforcement of foreign contracts, it results that there is contrariety of view, and the proposition above stated is not universally admitted. Thus, in New York, a contract made in Kentucky, under a law of that state, establishing a lottery for the benefit of a college, was upheld, notwithstanding the law of New York prohibiting lotteries. Commonwealth of Kentucky v. Bassford, 6 Hill (N. Y.) 526. Chief Justice Nelson limited the cases of contracts not enforceable, though valid where made, to such as are

[37] This statement of facts has been substituted for that of the original report.

[38] A part of the opinion has been omitted.

plainly contrary to morality. He gave no consideration to the doctrine elsewhere settled, that excludes from enforcement, contracts opposed to the public policy or violative of a public law of the place of enforcement. In this view, he seems to be sustained by the Court of Appeals. Thatcher v. Morris, 11 N. Y. 437.

So, in Massachusetts, a contract arising out of a completed sale of lottery tickets, in a state where such sale was lawful, was enforced by the courts, although such sale was there prohibited by statute. McIntyre v. Parks, 3 Metc. (Mass.) 207. But there was no discussion of principles by the court. * * *

We are brought, then, to the question whether our law against gaming is such a public law and establishes such a public policy as to require us to refuse to enforce foreign contracts in conflict with it, in a case like that under consideration. I think this question must be answered in the affirmative.

It is true that, in Dolman v. Cook, 14 N. J. Eq. 56, and Campion v. Kille, 14 N. J. Eq. 229, foreign contracts, valid by the law of the state where made, were enforced here, although by our laws they were usurious and declared to be void. No consideration seems to have been given to the question whether our usury law was such a law and evinced such a public policy as required us to refrain from enforcing foreign contracts in conflict with it. As we have seen, that consideration led our courts to reject foreign assignments violative of our laws, where the interests of our own citizens were concerned. But a plain distinction at once presents itself between a usury law and a law regulating assignments for the benefit of creditors, or a law against gaming. One affects only the parties to the contract, and is framed for the protection of the borrower. The others relate to the public or classes of the public who are interested therein and affected thereby.

But our law against gaming goes further than to merely prohibit the vice or avoid contracts tainted with it. It declares it unlawful, and so puts the contracts beyond the protection of the laws or the right of appeal to the courts. The reason and object of the law are obvious. The vice aimed at is not only injurious to the person who games, but wastes his property, to the injury of those dependent on him, or who are to succeed to him. It has its more public aspect for if it be announced that a trustee has been false to his trust, or a public officer has embezzled public funds, by common consent the first inquiry is whether the defaulter has been wasting his property in gambling.

In my judgment, our law against gaming is of such a character and is designed for the prevention of a vice, producing injury so widespread in its effect, the policy evinced thereby is of such public interest that comity does not require us to here enforce a contract which, by that law, is stigmatized as unlawful, and so prohibited. * * *[39]

[39]Accord: Pope v. Hanke, 155 Ill. 617, 40 N. E. 839, 28 L. R. A. 568 (1894); Minzesheimer v. Doolittle, 60 N. J. Eq. 394, 45 Atl. 611 (1900); Winward

KAUFMAN v. GERSON.

(Court of Appeal, 1904. 73 L. J. K. B. 320, 1 K. B. [C. A.] 591.)

The plaintiff, Kaufman, was a commission merchant in Paris. The defendant was the wife of a man named Gerson, a German by birth, domiciled in France, and was induced by threats of a criminal prosecution against her husband in France to give an undertaking to the plaintiff to pay him a large sum of money. The money was paid to the extent of £800. over a series of years, and there was a balance still left unpaid of the sum which the defendant had contracted to pay. Suit was brought for this balance in England.

Wright, J., gave judgment in favor of the plaintiff on the ground that the agreement was governed by the law of France and was valid according to French law. The defendant appealed.[40]

Montague Shearman, K. C., and E. G. Hills, for the defendant. The facts show an iniquitous bargain, which the court will not support. Agreements to stifle prosecutions and agreements which are inequitable because of some oppression or duress—see both aspects considered in Williams v. Bayley [1866] 35 L. J. Ch. 717, L. R. 1 H. L. 200—will not be enforced by an English court, although they may have been made abroad and may be valid according to foreign law. See Hope v. Hope [1857] 26 L. J. Ch. 417, 8 De G., M. & G. 731, where Turner, L. J., said: "I think that when the courts of one country are called upon to enforce contracts entered into in another country, the question to be considered is not merely whether the contract sought to be enforced is valid according to the laws of the country in which it was entered into, but whether it is consistent with the laws and policy of the country in which it is sought to be enforced. A contract may be good by the law of another country, but if it be in breach, fraud or evasion of the law of this country, or contrary to its policy, the courts of this country cannot, as I conceive, be called upon to enforce it." In Grell v. Levy [1864] 16 C. B. (N. S.) 73, it was held that a champertous agreement to be carried into effect in this country was not the less void because made in a foreign country where such a contract was legal. Again, in Rousillon v. Rousillon [1880] 49 L. J. Ch. 338, 14 Ch. D. 351, 369, Fry, J., said: "It appears to me, however, plain on general principles that this court will not enforce a contract against the public policy of

v. Lincoln, 23 R. I. 476, 51 Atl. 106, 64 L. R. A. 160 (1902). Contra: A. G. Edwards Brokerage Co. v. Stevenson, 160 Mo. 516, 61 S. W. 617 (1901).

The illegality in the original consideration will affect, also, every substituted contract, irrespective of the place of its making. Wynne v. Callander, 1 Russ. 293 (1826).

As to lottery and gambling contracts, see 64 L. R. A. 160–171. See, also, John D. Lawson, Enforcement of Contract Valid Where Made, but Contrary to the Public Policy of the State of the Forum, 54 Central Law Journal, 223–230. Giulio Diena, De la validité des jeux de bourse dans les rapports internationaux, 23 Clunet, 65–78, 284–294.

[40] This statement of facts has been substituted for that of the original report.

this country, wherever it may be made. It seems to me almost absurd to suppose that the courts of this country should enforce a contract which they consider to be against public policy simply because it happens to have been made somewhere else." See, also, the opinion of Wilmot, J., in Robinson v. Bland [1760] 1 W. Bl. 256, 260, to the same effect. Santos v. Illidge [1860] 29 L. J. C. P. 348, 8 C. B. (N. S.) 861—a case relating to the sale of slaves in Brazil—is not an authority against the defendant, as the decision in that case turned on the terms of the statutes dealing with the holding of slaves. Nor is Missouri Steamship Co., In re [1889] 42 Ch. D. 321, against the defendant. There a contract made in Massachusetts, intended to be governed by English law, was, although void by the law of Massachusetts, held enforceable here, inasmuch as it was neither immoral nor forbidden by positive law. The agreement in the present case comes within the category of contracts referred to in Westlake's Private International Law (3d Ed.) § 215, as conflicting "with what are deemed in England to be essential public or moral interests"; and so, although it may be valid by French law, it will not be enforced by an English court. It was immoral and unjust for the plaintiff to threaten the defendant that her husband would be prosecuted and she and her children disgraced if she did not make the agreement sued on. The court will not assist a person who does not come with clean hands.

Montague Lush, K. C., and Israel Davis, for the plaintiff. The mere fact that the agreement was obtained on the terms that the husband should not be prosecuted is not bad except by English law. An agreement not to prosecute is good by French law, and an agreement obtained on such terms does not amount to duress in French law. As the contract was made and was to be performed in France, the English courts will enforce it. There must be something more than a mere technical breach of the law to avoid a contract on the ground of public policy. Missouri Steamship Co., In re, 42 Ch. D. 321; Holman v. Johnson [1775] 1 Cowp. 341. The only pressure was the pressure of the threat of a prosecution in France. There was nothing in the nature of blackmail; the plaintiff was not seeking to make any profit, but was merely seeking to get back the money due to him by the defendant's husband, for which, moreover, the defendant was herself liable under the French Code, the parties having been married in France without a settlement. The agreement cannot be impeached on the ground that it is of a criminal or wicked or immoral nature—to use the language of Chitty, J., in Missouri Steamship Co., In re, 42 Ch. D. 321.

[They also referred on this point to Story's Conflict of Laws, § 245 et seq.]

But, even assuming that the agreement might have been set aside as having been obtained by undue pressure, the defendant cannot now, after having paid various installments, be permitted to disaffirm it. She must be held to have ratified the agreement. Ormes v. Beadel [1860] 30 L. J. Ch. 1.

[The question of the defendant's counterclaim was not argued, but the defendant reserved her rights as to it in the event of the case being taken further.]

COLLINS, M. R.[41] * * * Two points have been taken here—first, that the agreement was bad on the ground that it was made to stifle a prosecution; and secondly, that it was bad also, and could not be enforced in England, as it had been obtained by duress. The judge, on the evidence, came to the conclusion that it had been clearly established that there was nothing wrong from the point of view of French law in agreeing for value to stifle a prosecution. Any agreement between the parties would not prevent justice taking its course if the public prosecutor chose to intervene, and as the contract was made in France by persons domiciled there with a view to its performance in France, the judge held that the defence set up that the contract was bad because it was to stifle a prosecution was not a ground upon which a court in England would stay its hand.

The other point set up by the defendant—namely, that the circumstances were such that an English court would not enforce the contract as it had been obtained by coercion—involves a question of fact. Was the contract obtained by coercion? It seems to me that Mr. Justice Wright was of opinion that it was. He said: "Gerson appropriated part of the money to his own use instead of applying it in buying skins. His conduct was criminal in France, and a prosecution was threatened. In order to avoid a prosecution, and to protect the good name of Gerson's children, his wife, the present defendant, under the influence of Kaufman's threat and at his instance, agreed in writing to make good by installments out of her own property the amount of the defalcation, on the express terms that there should be no prosecution on the part of Kaufman." When one reads the defendant's own evidence upon the matter, it seems to me perfectly clear that it was under pressure of the threat of prosecution that she undertook to sign the guarantee. She stated in evidence that Kaufman said to her that if she refused he would dishonour her family; and that her only consideration was her children, whose names she thought would be dishonoured if their father was prosecuted by the plaintiff. In answer to this point, that the contract was obtained by coercion, it was said that the defendant and her husband being in France and married under the Code Napoléon there was community of goods between them, and that the wife was civilly liable with the husband for his debts. But, however that may be, it is quite evident that the plaintiff was not content with civil remedies, such as they might be, against the wife; he sought to obtain from her something he was not entitled to demand, and he forced her to concede to him that advantage by the strongest possible moral pressure—the threat to prosecute her husband and disgrace her and her children's names. Yielding to that pressure, and to nothing else, she was con-

[41] The concurring opinions of Romer and Mathew, L. JJ., have been omitted.

strained into giving the guarantee, and she has paid a considerable sum under it. It was under a continuous threat of prosecution being instituted that she made the payments which she did make. It was not until she was finally driven to it by civil proceedings in England that she set up the defence she now sets up and refused to pay the unpaid balance which she had contracted to pay. The point is whether an agreement obtained under these circumstances can be enforced in England or not.

I do not deal with the point that a contract to interfere with the course of justice is one that would not be enforced in this country. In this particular matter the law of France differs from the law of England, and I am not prepared to say whether such a contract being good in France might or might not be enforced here. On that I am not prepared to give a final opinion.

I now come to the real point in the case. It is said that by the law of France an agreement obtained by moral pressure is one that can be enforced, and Mr. Justice Wright seems to take that view. It is clear that he thought that the form of pressure used would be coercion in English law, but he seems to have thought that it would not be coercion by French law, and therefore that the English courts would enforce the contract. He says: "The second ground on which the contract in the present case is impeached is that it was obtained by the undue influence or duress of a threat to prosecute the husband for crime. If this objection is to be regarded as based on considerations of public policy, the same answer applies as in the case of the first objection. It seems, however, to be more in the nature of an objection to the proof of consent of the defendant to the contract, a consent induced by duress or undue influence being by English law treated as no consent. If this be the correct view, it would seem that the law of the country in which the contract is made and is to be performed and in which the parties are domiciled, ought to prevail unless there is such duress as must be considered to avoid the contract under any but unreasonable and uncivilized institutions of law—a description which would be applicable to such a case as that of consent obtained, e. g., by physical torture, or by the use of drugs, but which cannot properly be applied to this case." The whole point of the judgment is contained in these last words. The judge seems to admit that if the contract had been obtained by physical violence, as, for example, by the use of a pistol, the contract would not be enforceable in an English court, whatever the courts of other countries would do. But how does it matter in what manner the coercion is applied if the will is coerced? The question is, was there coercion? Some people are more impressed by moral than by physical coercion. The coercion in this case was a threat to prosecute the husband and disgrace the wife and children, and to say that that is not coercion is impossible. Then it was said that, unless there is a principle universally recognized by all civilized countries under which the courts of those countries would refuse to enforce such a contract, we are not

entitled to apply that principle in England in such a case as the present, if it can be shown that a civilized country—France in this case—does not accept that principle, and would enforce such a contract. The authorities do not bear out that proposition. In Story's Conflict of Laws, § 258, it is said, in reference to contracts which in their own nature are founded in moral turpitude and are inconsistent with the good order and solid interests of society, that "even though they might be held valid in the country where they are made, would be held void elsewhere, or at least ought to be, if the dictates of Christian morality or of even natural justice are allowed to have their due force and influence in the administration of international jurisprudence." The court called upon to enforce a foreign contract will enquire whether it violates such principles. It is a principle of our courts that a person who comes to seek a remedy must come with clean hands; and if he is obliged to aver something against public morality which would debar him from obtaining relief if the contract were made here, he is debarred from suing here on a contract made abroad and which may be good by foreign law; the fact, that in other countries he might be allowed to sue in such circumstances does not control the English courts. I have already read article 258 of Story's Conflict of Laws. The point is also dealt with in Westlake's Private International Law, where it is said (section 215): "Where a contract conflicts with what are deemed in England to be essential public or moral interests, it cannot be enforced here notwithstanding that it may have been valid by its proper law. * * * Section 214 may be referred to the same principle, but the cases in which a breach of English law is contemplated may usefully be kept distinct from those in which English law declines for other reasons to aid a contract. The difficulty in every particular instance cannot be with regard to the principle, but merely whether the public or moral interests concerned are essential enough to call it into operation; and where a breach of English law is not contemplated, this is necessarily a question on which there is room for much difference of opinion among judges." Here the point is whether a contract obtained by such moral pressure as I have mentioned is one which an English court will enforce. In my opinion, the principle to which I have referred, that a contract obtained by coercion will not be enforced, is one which ought to exist universally, even though it may not in fact be acted upon in some countries. This court will not violate its own principles by giving effect to a bargain which has been brought about by coercion. That is not inconsistent with any of the authorities cited to us, and it is certainly supported by more than one of the decided cases, at all events by weighty dicta in these cases; in particular we have those of Lord Justice Turner in Hope v. Hope, 26 L. J. Ch. 417, 8 De G., M. & G. 731—dicta from which I do not think Lord Justice Knight-Bruce dissented. In another case—Rousillon v. Rousillon, 49 L. J. Ch. 338, 14 Ch. D. 351, 369—Mr. Justice Fry formulated the same principle. No case has been cited to us which conflicts with those views. On broad

general principles I am of opinion that the defendant is entitled to the protection of this court in refusing to give effect to a contract which ought never to have been made. The appeal must therefore be allowed.[42]

II. Special Contracts.

(A) *Agency and Partnership.*

KING v. SARRIA.

(Court of Appeals of New York, 1877. 69 N. Y. 24, 25 Am. Rep. 128.)

Folger, J.[43] The plaintiffs seek to recover a sum of money from the defendant Sarria, upon contract. They do not show that he in person made with them the contract which they allege. It is, indeed, one of the conceded facts in the case that the contract was made, as matter of fact, by persons other than Sarria. To succeed, then, in their action, they must show that those persons in some way represented Sarria, and had authority to bind him thereto, to the full extent to which the plaintiffs seek to hold him. To show such authority, proof is made that Sarria was a partner with Grau & Lopez, and that the latter two, under the firm name of Grau, Lopez & Co., made the contract. If nothing more appeared in the case, this would suffice for the plaintiffs; for, by virtue of the relation of partnership, one partner becomes the general agent for the other, as to all matters within the scope of the partnership dealings, and has thereby given to him all authority needful for carrying on the partnership, and which is usually exercised by partners in that business. Hawken v. Bourne, 8 M. & W. 703. Indeed, it is as agent that the power of one partner to bind his copartner is obtained and exercised. The law of partnership is a branch of the law of principal and agent; (Cox v. Hickman, 8 H. of L. Cas., 268; Baring v. Lyman, 1 Story [U. S.] 396, Fed. Cas. No. 983; Worrall v. Munn, 5 N. Y. 229, 55 Am. Dec. 330). In the case first above cited (8 M. & W. 703), it is added: That any restriction which by agreement amongst the partners is attempted to be imposed upon the authority which one partner possesses as the general agent of the other, is operative only between the partners themselves, and does not limit the authority as to third persons, who acquire rights by its exercise, unless they know

[42] In this country an action for the price of slaves has been allowed in states where slavery was prohibited, the sale being valid where made. Osborn v. Nicholson, 13 Wall. (U. S.) 654, 20 L. Ed. 689 (1871); Greenwood v. Curtis, 6 Mass. 358, 4 Am. Dec. 145 (1810); Roundtree v. Baker, 52 Ill. 241, 4 Am. Rep. 597 (1869). See Wald's Pollock on Contracts (Williston's Ed.) 509–511; Minor, Conflict of Laws, § 9.

[43] A part of the opinion only is given.

that such restriction has been made. It is manifest, however, that this remark is to be qualified, when taken in connection with any statute law, which has provided for the formation of limited partnerships, where that statute law is operative. A due observance of such statutory provisions limits the liability of the special partner. It limits, too, the authority of the general partner, as the agent of the special partner, and fixes beforehand the extent to which, as agent, he may bind the special partner. It is hardly necessary to say that when a limited partnership is duly formed and carried on under our statute, though the general partner is the agent for all the partners, with powers full enough to transact all the business of the firm, and to bind it to all contracts within the scope of that business, he gets no authority, from his relation as partner and agent of the special member of the firm, to fix upon him any greater liability than that which has been stipulated for. These principles are stated here, not as new or forgotten by any one, but as the basis upon which the determination of this case will rest.

It turned out that the partnership of Grau, Lopez & Co. was created by a formal instrument in writing, and that, by its terms, the liability of Sarria was special, and limited in extent to a fixed amount. That instrument (it is found as fact by the learned referee), and all the doings of the three partners under it, have been in due accord with the Commercial Code of Spain, of which nation they were citizens, and under whose government and laws they were living and acting when they executed the instrument, and formed and carried on the partnership. And it is proven and found as fact in the case, that when in due pursuance of the Spanish law, a person has, as did Sarria, entered into such a partnership with others, and has, as did Sarria and his partners, duly observed and carried out the provisions of the law and the terms of their agreement, the liability of the special partner, as was Sarria, is limited to the amount of funds which he has contributed according to his agreement. It is well to observe here, that the learned referee has found that Sarria never had any partnership connection with Grau & Lopez, other than that of a limited partner; that he did not use, nor permit to be used, his name in the firm name; that he did not, by any representation, act or omission, hold himself out, or render himself liable, as a general partner. We have then, Sarria himself making, in person, no contract with the plaintiffs, and giving a special and express authority only, to Grau & Lopez to make one, which authority was in exact pursuance of law. Those who deal with one as agent do so at their peril, if it turns out that he had no authority from a principal; and where they rely upon his delegated authority as that of a partner, and know that the partnership was created in another country, must they not look to it, to see how far that law, and the partnership under it, give power to the acting partner? As then, the power of Grau & Lopez to bind Sarria by contract was that of partners, that is, of agents; and

as their authority was lawfully restricted, so that they could not bind him in a liability greater than that named in the contract of partnership, it seems to follow that the plaintiffs have no contract which can be enforced against Sarria, otherwise or further, than is provided for by the terms of that authority. Nor did Grau & Lopez make the contract with the plaintiffs in the name of Sarria, nor with any special claim of right to represent him. They made it in the name of Grau, Lopez & Co., and claiming only to represent that partnership. As to Sarria, the unnamed partner, they were agents, acting under an authority special, express, limited, and could give to the plaintiffs no more claim upon Sarria than such an authority empowered them. The plaintiffs were subject, in these dealings with Sarria, to the limitations which he had lawfully put upon the powers of his agents. Again, to state familiar doctrine, no one, in dealing with an agent, may hold the principal to a contract which was not within the authority of the agent to make; nor where there is an express written authority, is it to be enlarged by parol, or added to by implication. It is to be construed, as to its nature and extent, according to the force of the terms used, and the objects to be accomplished.

But it is claimed by the learned counsel for the plaintiff that the Commercial Code of Spain cannot have an extraterritorial effect; and that one dealing in this state, in which that law does not rule, cannot avail himself of its effect. If this be so, it must be because the law of this state forbids a foreigner, in such a case as this, from invoking the aid of any law of his domicile. But one country recognizes and admits the operation within its own jurisdiction, of the laws of another, when not contrary to its own public policy, nor to abstract justice, nor pure morals. It does this on the principle of comity. It has been so long practiced that it is stated as a principle of private international jurisprudence; that rights which have once well accrued by the law of the appropriate sovereign are treated as valid everywhere. Westlake on Priv. Int. Law, art. 58.

The principle from which originates the influence exercised by the law of a foreign state, in determining the status or rights of its subjects in another country, is thus well stated. It is the necessary intercourse of the subjects of independent governments, which gives rise to a sort of compact, that their municipal institutions shall receive a degree of reciprocal efficacy and sanction within their respective dominions. It is not the statutes of one community which extend their controlling power into the territories of another; it is the sovereign of each who adopts the foreign rule, and applies it to those particular cases in which it is found necessary to protect and cherish the mutual intercourse of his subjects, with those of the country whose laws he adopts. Per Sir Samuel Romilly, arguendo, Shedden v. Patrick, 1 Macqueen's H. of L. Cases, 554.

It cannot be said that there is a rule of exclusion, on account of this particular law being contrary to our public policy. It much re-

sembles our own statute for the formation of limited partnerships, and, with some difference in detail, it aims at the same beneficial result, which ours has in view; nor may we say with our statute before us, that the law is opposed to good morals or abstract justice. There cannot be that exclusion, because it is a rule of our law not to give, in any case, to a foreigner the benefit of the law of his domicile.

Mr. Nash was correct, in opening his argument, in saying that this is a case of first impression in this state. Hence it is, that in looking for the reasons upon which it is to be decided, we have to be governed by the analogies of the law, rather than cases in point. Let us see where those analogies tend. If one marry, where marriage is only a civil contract, his marital relation will be held valid, in a country where a religious ceremony is, by its law, deemed vital. The same principle prevails with us, though not called into application by such a state of facts. It is an established principle that the law of the place where contracts purely personal are made, must govern as to their construction and validity, unless they are made to be performed in another state or country. Curtis v. Leavitt, 15 N. Y. 227; Chapman v. Robertson, 6 Paige, 627, 31 Am. Dec. 264. This contract of partnership was made to be performed in Cuba. The contract made by the partnership with the plaintiffs, it may be conceded, was made in New York, to be performed here. The contract with the plaintiffs will be construed and enforced by the laws of this state, and they will determine the nature and extent of the liability upon it, of the partnership, the maker of it. The former, the contract of partnership, between the members of the firm, will be construed and weighed by the laws of Spain, and they will determine the liability of Sarria, and the extent of the authority given by him to Grau and Lopez. In Commonwealth of Kentucky v. Bassford, 6 Hill, 526, the Supreme Court of this state maintained an action on a bond, given to secure the payment of money, to be raised and distributed by a lottery, on the ground that it was a valid and legal obligation in Kentucky, where it was assumed that it was made, and where it was to be executed, though opposed to the statutory policy of this state. And the rule has been so far carried, in one jurisdiction, in recognizing the law of the domicile, as to enforce a claim of property in slaves (Madrazo v. Willes, 3 Barn. & Ald. 353; see, also, Greenwood v. Curtis, 6 Mass. 358, 4 Am. Dec. 145; Commonwealth v. Aves, 18 Pick. [Mass.] 215; The Antelope, 10 Wheat. [U. S.] 66, 6 L. Ed. 268); and so far in another jurisdiction as to hold good a sale of lottery tickets in this state (McIntyre v. Parks, 3 Metc. [Mass.] 207).

There is a close analogy between this case and questions arising as to the authority of the master of a vessel to bind his owners in a foreign port. Though the solution of the latter depends upon the rules of the maritime law more particularly, yet the relation of

the master and the owners is but a branch of the general law of principal and agent, and so the ultimate reason of each starts from the same root. It is not a new doctrine, that a master of a vessel cannot bind her owners, in a foreign port, to any greater liability than will be recognized by the law of their domicile. Pope v. Nickerson, 3 Story, 465, Fed. Cas. No. 11,274. And the rule there laid down has been recognized and applied in the Court of Queen's Bench, on the principle that the power of the master to bind the owners personally is but a branch of the general law of agency. Lloyd v. Guibert, 6 Best & Smith, 100; s. c., in Exch. Ch., Id. That case, also, in its reasoning recognizes the distinction, which we have stated, between the law which is to affect the question of the authority to make a contract, and that which is to determine the validity and effect of the contract when made. It was urged there, too, by counsel, but without effect, that the law of the place where the contract was made, and of the place where it was to be performed, was different from the law of the domicile of the defendants. It was also urged that the contract entered into was bona fide, in the ordinary course of business by the master, and within the scope of his ostensible authority to contract; and that his power could not be narrowed by provisions of foreign law, unknown to the party dealing with him, more than by secret instructions; but urged without avail. So, also, in the case of The Moxham, in the English Court of Appeal (Law Rep. 1876, part 6, June 1, p. 107), it is pertinently said: "One can understand that a contract between master and servant, or the relations between principal and agent, may affect a contract made by the agent, qua agent, with foreigners; that is to say, it may affect the nature and extent of his agency."

So, too, in actions of tort, it has been held that an extraterritorial law will furnish a defense in the courts of England. Philips v. Eyre, Law Rep. 6 Q. B. 1. It is said that an act committed abroad, if valid and unquestionable by the law of the place, cannot, so far as civil liability is concerned, be drawn in question elsewhere, unless by force of some distinct, exceptional legislation. See, also, Dobree v. Napier, 2 Bing. N. C. 781.

The effect of the judgments in these cases is this: That where the essentials of a contract made under foreign law, are not hostile to the law and policy of this state, the contract may be relied upon and availed of in the courts of this state. If the substance of the contract is against that law and policy, our judicatories will refuse to entertain it and give it effect. Hence the contract of partnership made by Sarria, in Cuba, may be availed of by him here. * * *

Judgment affirmed.[44]

[44] Accord: *Germany*, O. A. G. Lübeck, March 31, 1846 (2 Seuffert's Archiv, 324); A. G. Celle, May 31, 1876 (31 Seuffert's Archiv, 385). *France*, Orléans, Dec. 12, 1904 (1 Darras, 502), semble.

CHATENAY v. BRAZILIAN SUBMARINE TELEGRAPH CO.

(Court of Appeal, 1891. 1 Q. B. 79, 60 L. J. Q. B. 295.)

Appeal from a judgment of Day, J., on a preliminary issue.

In the year 1880 the plaintiff, who was a Brazilian subject and resident in Brazil, executed, in favour of one Broe, a stockbroker carrying on business in the city of London, a power of attorney to purchase and sell shares in public companies and public funds. The power of attorney was in the Portuguese language, and was executed by the plaintiff in Brazil with the formalities required by the Brazilian law. Broe, purporting to act under the power of attorney, disposed of certain shares in the defendant company which were the property of the plaintiff and registered in his name. Broe did not account to the plaintiff for the proceeds of the sale of these shares, the purchasers of which were registered as owners in the books of the company. The plaintiff issued an originating summons asking for the rectification of the register by inserting therein his name as holder of the shares, and an issue was directed to be tried by a jury in London to determine whether the plaintiff was entitled to have the register so rectified. Before this issue came on for trial an order was made that the question whether Brazilian or English law was to govern the construction of the power of attorney should be tried by a judge without a jury. The matter came on before Day, J., who decided that English law was to govern the construction of the power of attorney, and a certificate to that effect was accordingly made out.

The defendants appealed.

Lord ESHER, M. R.[45] In this case a person resident in Brazil and carrying on business there wrote down that which he intended to be an authority to an agent, if that agent would accept the delegation. The person whom he desired to be his delegate did afterwards accept that delegation. The question raised is, what is the meaning of that document? Now, I agree that it has one meaning, and no more; and the question is, what was the meaning of the plaintiff when he wrote that document? The Court has to ascertain that meaning from a consideration of what it is that was written under the circumstances in which it was written; that is, in other words, having regard to the words used, and to the surrounding circumstances at the time they were used.

Now, this writing was a business document, written in Brazil in the Brazilian language, and with the formalities necessary according to the Brazilian law and custom, by a man of business carrying on business in Brazil. An English Court has to construe it, and the first thing, therefore, that the English Court has to do is to get a translation of the language used in the document. Making a translation is not a mere question of trying to find out in a dictionary the words

[45] The concurring opinion of Lindley, L. J., has been omitted.

which are given as the equivalent of the words of the document; a true translation is the putting into English that which is the exact effect of the language used under the circumstances. To get at this in the present case you must get the words in English which in business have the equivalent meaning of the words in Brazilian, as used in Brazil, under the circumstances. Therefore you would want a competent translator, competent to translate in that way, and, if the words in Brazil had in business a particular meaning different from their ordinary meaning, you would want an expert to say what is that meaning. Amongst those experts you might want a Brazilian lawyer—and a Brazilian lawyer for that purpose would be an expert. That is the first thing the Court has to do. Then, when the Court has got a correct translation into English, it has to do what it always has to do in the case of any such document—either a contract, or such an authority as this—that is to say, determine what is to be taken to be the meaning of the party at the time he wrote it, and what is to be inferred from the language which he has used. There are certain inferences which are adopted in ascertaining the meaning of the language used, unless in the particular instance the contrary intention appears. One inference which has been always adopted is this: if a contract is made in a country to be executed in that country, unless there appears something to the contrary, you take it that the parties must have intended that that contract, as to its construction, and as to its effect, and the mode of carrying it out (which really are the result of its construction), is to be construed according to the law of the country where it was made. But the business sense of all business men has come to this conclusion, that if a contract is made in one country to be carried out between the parties in another country, either in whole or in part, unless there appears something to the contrary, it is to be concluded that the parties must have intended that it should be carried out according to the law of that other country. Otherwise a very strange state of things would arise, for it is hardly conceivable that persons should enter into a contract to be carried out in a country contrary to the laws of that country. That is not to be taken to be the meaning of the parties, unless they take very particular care to enunciate such a strange conclusion. Therefore the law has said, that if the contract is to be carried out in whole in another country, it is to be carried out wholly according to the law of that country, and that must have been the meaning of the parties. But if it is to be carried out partly in another country than that in which it is made, that part of it which is to be carried out in that other country, unless something appears to the contrary, is taken to have been intended to be carried out according to the laws of that country.

Now, applying those rules to the present case, the first thing to be done is to get at the true construction of the language used in the authority. When the plaintiff used the Brazilian language in this document he must have used it in the business sense given to it in

Brazil. Therefore, that has to be ascertained; and then having got that, the equivalent in the English language must be found. Having got in English the equivalent of the Brazilian words, we have to see what the meaning of the language so used is. If it appears that the contract is to be performed in Brazil wholly—that is to say, that the contract shall be performed according to Brazilian law—that is the construction of it, and that is the meaning of the parties; but if it appears that it was to be wholly carried out in England, we should infer that the meaning of the parties and the true construction of the contract were that it was to be carried out according to English law. If we find that the authority might be carried out in England, or in France, or in any other country, we come to the conclusion that it must have been intended that in any country where in fact it was to be carried out, that part of it which was to be carried out in that country was to be carried out according to the law of that country. That would be putting one construction only on the document, and not putting a different construction on it in different countries. The one meaning that he had was: "I give an authority which if carried out in England is to be carried out according to the law of England; if in France, according to the law of France." That is one meaning, though this authority is to be applied in a different way in different places.

If that is so, then the way to express that in the present case is this: This authority was given in Brazil, and the meaning is to be established by ascertaining what the plaintiff meant when he wrote it in Brazil. The authority being given in Brazil, and being written in the Portuguese language, the intention of the writer is to be ascertained by evidence of competent translators and experts, including if necessary Brazilian lawyers, as to the meaning of the language used; and if according to such evidence the intention appears to be that the authority shall be acted upon in foreign countries, it follows that the extent of the authority in any country in which the authority is to be acted upon is to be taken to be according to the law of the particular country where it is acted upon.

Now, that I consider to be a mere expansion of the judgment of Day, J. It is the same judgment, but it is in an expanded form. His judgment, therefore, is not altered, but is held to be a correct judgment, although we express it in an expanded form. It follows that the appeal fails, and must be dismissed.[46]

[46] Compare Baldwin v. Gray, 4 Mart. (N. S.) 192, 16 Am. Dec. 169 (1826).

ST. NICHOLAS BANK OF NEW YORK v. STATE NAT. BANK.

(Court of Appeals of New York, 1891. 128 N. Y. 26, 27 N. E. 849, 13 L. R. A. 241.)

This action was brought to recover the proceeds of a draft for $473.57 sent for collection by the plaintiff to the defendant, and paid to the defendant's correspondents. The trial resulted in the direction of a verdict for the plaintiff for the amount demanded. Upon appeal to the General Term, the judgment entered upon the verdict was reversed, and a new trial ordered. From the order of reversal the plaintiff appealed to this court. There is no controversy as to the facts, which for the most part were set forth in a stipulation read upon the trial. They may be summarized as follows: The plaintiff is a corporation organized under the laws of the state of New York, and engaged in the business of banking in the city of New York; and the defendant is a corporation organized under the national banking act, and doing business in the city of Memphis. For two years prior to the 18th day of November, 1884, the plaintiff had been accustomed to send checks, notes, and drafts to the defendant for collection, including such as were drawn upon persons residing at a distance, in the state of Texas and elsewhere. The commercial paper was inclosed in letters, consisting of printed forms, filled out by the insertion in writing of the date, the name of the defendant's cashier, and a description of the inclosure. The checks and drafts were collected by the defendant, and the proceeds were remitted to the plaintiff, less one-fourth of 1 per cent., the defendant's commission, and the expense incurred in making distant collections. On November 10, 1884, the plaintiff was the owner and holder of a check for $473.57 dated November 6, 1884, drawn upon the City National Bank of Dallas, Tex., by A. D. Aldridge & Co., and payable to the order of Henry Levy & Son. This check was indorsed by the plaintiff to the defendant for collection, and was sent to the latter in the usual course of business. The defendant received the check on November 13, 1884, and on that day indorsed it for collection, and forwarded it by mail to the firm of Adams & Leonard, at Dallas, Tex. They were at the time, and had been for many years, bankers in good standing at Dallas, and the correspondents of the defendant. They received the check on November 17, 1884, and on that day duly presented it for payment to the bank upon which it was drawn, and it was immediately paid, and the proceeds were received by them. They then remitted to the defendant a sight draft for the amount collected, drawn by them upon Jemison & Co., of the city of New York. This draft was sent by the defendant for collection to the First National Bank of New York, and on November 24, 1884, was presented to Jemison & Co., who, in the mean time, had suspended payment. The draft was accordingly protested, and returned to the

defendant. Thereupon the defendant, on November 28, 1884, mailed the protested draft to the plaintiff, and the plaintiff refused to accept it. Adams & Leonard had failed in business before the draft on Jemison & Co. was presented for payment. The only evidence offered by the defendant in opposition to these facts was proof of a decision of the Supreme Court of Tennessee, in the case of Bank of Louisville v. First Nat. Bank of Knoxville, 8 Baxt. (Tenn.) 101, 35 Am. Rep. 691, which is referred to in the opinion.

EARL, J.[47] * * * But it cannot be maintained that the contract between these parties was a Tennessee contract. It is by no means clear, even, that it can be held that the contract was made there. It does not certainly appear where it was made. It cannot be said that a new contract was made every time a piece of paper was sent by the plaintiff to the defendant for collection. There was a general contract between the parties, which was either created by some negotiation, or which grew out of the course of business between them, that the defendant should collect the paper sent to it for the compensation to be allowed. If that contract was made by correspondence, the plaintiff making a proposition by mail, and the defendant accepting it by mail, then, when the acceptance was put in the mail at Memphis, the contract was complete, and had its inception there. If the proposition came from the defendant, and was accepted in the same way in New York, then it would have to be treated as made in New York. In the absence of more proof than we have here, it cannot be assumed that this contract was made in Tennessee. Nor is this to be regarded as a Tennessee contract, for the reason that it was to be performed there, so that the defendant can claim that its obligations and interpretation are to be governed by Tennessee law. We cannot perceive how any substantial part of the contract was to be performed in Tennessee. The defendant was to collect this draft in Texas, and pay its proceeds, less its compensation, to the plaintiff in New York, and so the contract was to be performed in Texas and New York. Adams & Leonard collected the draft for the defendant in Texas, and sent it their own draft on Jemison & Co. This draft the defendant sent to the First National Bank of New York for collection and credit. If the draft had been paid, then the defendant would have had credit for the amount with that bank, and would probably have sent its own draft on that bank to the plaintiff for the amount of the collected draft, less its compensation, and that bank would have paid that draft on presentation, and thus the proceeds of the collected draft would finally have reached the plaintiff, and the obligation of the defendant would then,

[47] In the omitted portion of the opinion it was held (1) that, under the law of New York, a bank receiving commercial paper for collection, in the absence of a special agreement, is liable for a loss occasioned by the default of its correspondents; (2) that, if the contract was to be deemed a Tennessee contract, in which state a different rule obtained, the New York courts would follow their own precedents in the expounding of the general common law applicable to commercial transactions.

and not until then, have been fully discharged. So, always, the defendant having collected a draft sent to it by the plaintiff, and received the proceeds thereof, would, in the ordinary course of business, discharge its obligation to the plaintiff by payment through its corresponding bank in New York. Therefore we think it is quite clear that this contract cannot, in any view, be treated as a Tennessee contract, subject in any way to the law of that state. Our conclusion, therefore, is that the order of the General Term should be reversed, and the judgment entered upon the verdict affirmed, with costs. All concur.*

(B) *Guaranty and Suretyship.*

TENANT v. TENANT.

(Supreme Court of Pennsylvania, 1885. 110 Pa. 478, 1 Atl. 532.)

GREEN, J.[48] The contract in suit in this case was in form a promissory note under seal for the payment of $130.52, dated October 26, 1869, payable nine months from date. No place of payment is designated in the instrument; but it was given to A. W. Tenant, administrator of William Tenant, deceased, who was a resident of West Virginia at the time of his death, and the administrator was and is also a resident of the same state. The note was given in payment of certain articles purchased at administrator's sale held in West Virginia soon after the intestate's death, and was delivered to the payee in that state. Two sureties joined in the note, one of whom lived in West Virginia and the other in Pennsylvania; and it is against these the present suit is brought. Of course, the note being payable at the residence of the payee, and having been delivered there for goods sold there, must be deemed and taken to be a West Virginia contract.

*CONTINENTAL LAW.—The powers of an agent appointed for a particular territory has been held to be governed, with respect to third parties, by the law and usages of such country. R. G. Dec. 5, 1896 (7 Niemeyer, 341).

The right of a partner to represent the firm is determined by the law of the place where the partnership is constituted. R. O. H. G. Feb. 17, 1871 (26 Seuffert's Archiv, 163).

So the powers of the administrator of a foreign corporation depend upon the law of the state where such authority was conferred. App. Lyon, May 8, 1907 (35 Clunet, 173).

The rights of a commission merchant seem to be governed by the law of the place where he carries on his business. R. G. Dec. 16, 1885 (14 Clunet, 84); O. L. G. Colmar, March 27, 1896 (S. 1898, 4, 9), and note.

The authority of the master of a vessel to bind the owners by contract has been held to depend upon the law of the place where the mandate was given. App. Douai, Dec. 5, 1901 (19 Autran, 180); appeal rejected in Cass. July 27, 1903 (19 Autran, 178). In favor of law of the flag, App. Rennes, Dec. 21, 1887 (3 Autran, 675); Trib. Com. Marseilles, Dec. 21, 1900 (16 Autran, 809).

In the interest of commercial security, German courts will apply their own law with respect to the authority of the master of a foreign vessel issuing bills of lading for goods to be delivered in Germany. 34 R. G. 72 (May 2, 1894).

[48] A part of the opinion only is given.

This contract was made and was to be performed in that state, and hence the law of that state must govern in determining its validity, obligation, and construction. The only question in the case is whether the defense set up by the sureties must be determined by the law of West Virginia or the law of Pennsylvania. The defense is that the sureties gave notice to the creditor that he must proceed against the principal for the collection of the note, or they would no longer be responsible. By the law of West Virginia such a notice, to be effective, must be in writing. In this case it was verbal only, and therefore, if judged by the law of West Virginia, it was nugatory.

It is argued for the defendants that this right of relief to a surety is a matter relating to the remedy, and must, therefore, be determined by the lex fori. But we do not think this position tenable. The right of a surety to discharge his obligation by notice to the creditor to pursue the debtor is an incident of the contract of suretyship. It is a part of the law of that contract, and is, therefore, a part of the contract itself. It is a qualification of the obligation of the contract, reducing it from a peremptory and absolute obligation to one of a qualified or conditional character. It is true the surety may not exercise his right, and if he does not, his obligation remains intact. But, on the other hand, he may exercise it, and if he does, and the creditor pays no heed to the notice, and thereby fails to recover from the principal debtor, the very root of the surety's obligation is reached and destroyed; he is no longer liable; it is as though he had never contracted. Very different is this from the defense of the statute of limitations. There, the obligation of the contract is not terminated or defeated. Only a right to enforce it by an action in the courts is imperiled. The state simply declares that if her process is used it must be done within certain fixed periods of time, and if not so used the defendant may, at his option, plead the laches of the plaintiff, and receive the benefit of the prohibition. It is in substance a prohibition upon the use of process after a defined period, and this, of course, makes it matter of remedy only. For these reasons we think it quite clear that the right of a surety to discharge his obligation by a disregarded notice to the creditor to pursue the principal debtor, is a matter affecting the obligation of the contract, and must, therefore, be determined by the law of the place of the contract. The notice given in this case was verbal only, and therefore of no effect by the law of West Virginia, and hence unavailing here. * * *[49]

[49] So whether the defense of usury will lie will depend upon the law applicable to the contract of the principal. Pugh v. Cameron's Adm'r, 11 W. Va. 523 (1877); Brownell v. Freese, 35 N. J. Law, 285, 10 Am. Rep. 239 (1871).

COX v. UNITED STATES.

(Supreme Court of the United States, 1832. 6 Pet. 172, 8 L. Ed. 359.)

Error to the District Court of the United States for the Eastern District of Louisiana.

This action was brought by the district attorney of the United States against John Dick, deceased, and Nathaniel Cox, residents of New Orleans, as sureties on the official bond of Joseph H. Hawkins, late of New Orleans, navy agent of the United States. The bond was executed by Hawkins and his sureties at New Orleans. Hawkins died without having accounted for $15,555.18 which he had received in his official capacity. The jury returned a verdict for $20,000, being the amount of the penalty in the bond. Upon this a judgment was entered against the estate of John Dick and Nathaniel Cox, jointly and severally, for $20,000, and a judgment against Nathaniel Dick and James Dick, the legal representatives of John Dick, for $10,000 each.[50]

THOMPSON, J.[51] * * * Upon no possible ground can this judgment be sustained.

There are, however, one or two questions arising upon this record which have been supposed at the bar to have a more general bearing, which it may be proper briefly to notice. * * *

It was contended on the part of the plaintiffs in error, that the United States were bound to divide their action, and take judgment against each surety only, for his proportion of the sum due, according to the law of Louisiana; considering it a contract made there, and to be governed in this respect by the law of the state. On the part of the United States, it is claimed, that the liability of the sureties must be governed by the rules of the common law; and the bond being joint and several, each is bound for the whole; and that the contribution between the co-sureties is a matter with which the United States have no concern. The general rule on this subject is well settled; that the law of the place where the contract is made, and not where the action is brought, is to govern in expounding and enforcing the contract, unless the parties have a view to its being executed elsewhere; in which case it is to be governed according to the law of the place where it is to be executed. Robinson v. Bland, 2 Burr. 1077; Hunter v. Potts, 4 T. R. 182; Alves v. Hodgson, 7 T. R. 242; Smith v. Smith, 2 Johns. (N. Y.) 241, 3 Am. Dec. 410; Thompson v. Ketcham, 4 Johns. (N. Y.) 285. There is nothing appearing on the face of this bond, indicating the place of its execution, nor is there any evidence in the case, showing that fact. In the absence of all proof on that point, it being an official bond, taken in pursuance of an act of con-

[50] This short statement of facts has been substituted for that of the original report.

[51] A part of the opinion has been omitted.

gress, it might well be assumed as having been executed at the seat of government. But it is most likely that, in point of fact, for the convenience of parties, the bond was executed at New Orleans, particularly, as the sufficiency of the sureties is approved by the district attorney of Louisiana.

But admitting the bond to have been signed at New Orleans, it is very clear, that the obligations imposed upon the parties thereby looked for its execution to the city of Washington. It is immaterial where the services as navy agent were to be performed by Hawkins. His accountability for nonperformance was to be at the seat of government. He was bound to account, and the sureties undertook that he should account for all public moneys received by him, with such officers of the government of the United States as are duly authorized to settle and adjust his accounts. The bond is given with reference to the laws of the United States on that subject. And such accounting is required to be with the Treasury Department, at the seat of government; and the navy agent is bound, by the very terms of the bond, to pay over such sum as may be found due to the United States, on such settlement; and such paying over must be to the Treasury Department, or in such manner as shall be directed by the Secretary. The bond is, therefore, in every point of view in which it can be considered, a contract to be executed at the city of Washington; and the liability of the parties must be governed by the rules of the common law.

The judgment of the court below is reversed; and the cause sent back, with directions to issue a venire de novo.[52]

MILLIKEN v. PRATT.

(Supreme Judicial Court of Massachusetts, 1878. 125 Mass. 374, 28 Am. Rep. 241.)

Action against Sarah A. Pratt, wife of Daniel Pratt and resident of the state of Massachusetts, upon a contract of guaranty signed by her in Massachusetts and sent by mail to the plaintiffs, Deering, Milliken & Co., at Portland, Me.[53]

[52] See in general 20 Cyc. 1442; Wharton, Conflict of Laws, § 427s.

CONTINENTAL LAW.—In Germany it is held that the extent of the surety's liability is subject to the law governing the principal obligation, but whether the surety is liable at all depends upon the law of the place of performance of the contract of suretyship, which need not coincide with that of the principal contract. R. G. April 23, 1903 (13 Niemeyer, 423).

Whether the creditor can proceed against the surety without previous suit against the principal is governed by the law applicable to the contract of suretyship, and not by the lex fori. 9 R. G. 185 (May 23, 1883).

[53] This brief statement of facts has been substituted for that of the original report.

GRAY, C. J.[54] The general rule is that the validity of a contract is to be determined by the law of the state in which it is made; if it is valid there, it is deemed valid everywhere, and will sustain an action in the courts of a state whose laws do not permit such a contract. Scudder v. Union Nat. Bank, 91 U. S. 406, 23 L. Ed. 245. Even a contract expressly prohibited by the statutes of the state in which the suit is brought, if not in itself immoral, is not necessarily nor usually deemed so invalid that the comity of the state, as administered by its courts, will refuse to entertain an action on such a contract made by one of its own citizens abroad in a state the laws of which permit it. Greenwood v. Curtis, 6 Mass. 358, 4 Am. Dec. 145. McIntyre v. Parks, 3 Metc. 207.

If the contract is completed in another state, it makes no difference in principle whether the citizen of this state goes in person or sends an agent, or writes a letter, across the boundary line between the two states. As was said by Lord Lyndhurst: "If I, residing in England, send down my agent to Scotland, and he makes contracts for me there, it is the same as if I myself went there and made them." Pattison v. Mills, 1 Dow. & Cl. 342, 363. So if a person residing in this state signs and transmits, either by a messenger or through the post office, to a person in another state, a written contract, which requires no special forms or solemnities in its execution, and no signature of the person to whom it is addressed, and is assented to and acted on by him, there the contract is made there, just as if the writer personally took the executed contract into the other state, or wrote and signed it there; and it is no objection to the maintenance of an action thereon here, that such a contract is prohibited by the law of this commonwealth. McIntyre v. Parks, above cited.

The guaranty, bearing date of Portland, in the state of Maine, was executed by the defendant, a married woman, having her home in this commonwealth, as collateral security for the liability of her husband for goods sold by the plaintiffs to him, and was sent by her through him by mail to the plaintiffs at Portland. The sales of the goods ordered by him from the plaintiffs at Portland, and there delivered by them to him in person, or to a carrier for him, were made in the state of Maine. Orcutt v. Nelson, 1 Gray, 536; Kline v. Baker, 99 Mass. 253. The contract between the defendant and the plaintiffs was complete when the guaranty had been received and acted on by them at Portland, and not before. Jordan v. Dobbins, 122 Mass. 168. It must therefore be treated as made and to be performed in the state of Maine.

The law of Maine authorized a married woman to bind herself by any contract as if she were unmarried. Pub. Laws Me. 1866, p. 31, c. 52; Mayo v. Hutchinson, 57 Me. 546. The law of Massachusetts,

[54] Only so much of the opinion as relates to the situs of the contract of guaranty is given.

as then existing, did not allow her to enter into a contract as surety or for the accommodation of her husband or of any third person. Gen. St. 1860, c. 108, § 3; Nourse v. Henshaw, 123 Mass. 96. Since the making of the contract sued on, and before the bringing of this action, the law of this commonwealth has been changed, so as to enable married women to make such contracts. St. 1874, p. 117, c. 184; Major v. Holmes, 124 Mass. 108; Kenworthy v. Sawyer, 125 Mass. 28.

The question therefore is, whether a contract made in another state by a married woman domiciled here, which a married woman was not at the time capable of making under the law of this commonwealth, but was then allowed by the law of that state to make, and which she could not lawfully make in this commonwealth, will sustain an action against her in our courts. * * *

Judgment for the plaintiffs.

(C) *Bills and Notes.*

MONTANA COAL & COKE CO. v. CINCINNATI COAL & COKE CO.

(Supreme Court of Ohio, 1904. 69 Ohio St. 351, 69 N. E. 613.)

See ante, p. 341, for a report of the case.[55]

[55] With regard to bills and notes, see, in general, 121 Am. St. Rep. 870–879; 61 L. R. A. 193–226.

To the effect that the law of the place of payment will determine the negotiability of the instrument with respect to the maker, see Freeman's Bank v. Ruckman, 16 Grat. (Va.) 126 (1860); Stevens v. Gregg, 89 Ky. 461, 12 S. W. 775 (1890); Barger v. Farnham, 130 Mich. 487, 90 N. W. 281 (1902); Strawberry Point Bank v. Lee, 117 Mich. 122, 75 N. W. 444 (1898), semble. Contra, and in favor of the law of the place of making, Howenstein v. Barnes, 5 Dill. (U. S.) 482, Fed. Cas. No. 6,786 (1879). The law of the place of payment has been held to determine whether equitable defenses can be set up by the maker of a note, Brabston v. Gibson, 9 How. (U. S.) 263, 13 L. Ed. 131 (1850), semble; whether the joint maker of a note is entitled to notice, Phipps v. Harding, 70 Fed. 468, 17 C. C. A. 203, 30 L. R. A. 513 (1895), semble; and the amount of recovery as against the maker of a note or the acceptor of a bill, Scofield v. Day, 20 Johns. (N. Y.) 102 (1822). Stipulations for attorney's fees and costs of collection have been disallowed on the ground of public policy, being deemed to pertain to the remedy, or on the ground that they are penal. Commercial Nat. Bank v. Davidson, 18 Or. 57, 22 Pac. 517 (1889); Security Co. v. Eyer, 36 Neb. 507, 54 N. W. 838, 38 Am. St. Rep. 735 (1893); Arden Lumber Co. v. Henderson Iron Works & Supply Co., 83 Ark. 240, 103 S. W. 185 (1907).

The maker's or acceptor's liability upon a negotiable instrument, so far as it is dependent upon the negotiable or nonnegotiable character of the instrument, is not affected by the fact that it is negotiated in a jurisdiction where a different law prevails. Ory v. Winter, 4 Mart. (N. S.) 277 (1826).

The Place of Making.—A bill or note is deemed executed in the place where it is delivered. Hart v. Wills, 52 Iowa, 56, 2 N. W. 619, 35 Am. Rep. 255 (1879); Wells, Fargo & Co. v. Vansickle (C. C.) 64 Fed. 944 (1894). This rule applies to each contract contained upon such bill or note. Young v. Harris (1854) 53 Ky. 556, 61 Am. Dec. 170 (indorsement); Tilden v. Blair

EMBIRICOS v. ANGLO-AUSTRIAN BANK.

(Court of Appeal, 1905. 1 K. B. Div. 677, 74 L. J. K. B. 326.)

Appeal from the decision of Walton, J. [1904] 2 K. B. 870.

The action was brought by Messrs. L. & M. Embiricos against the Anglo-Austrian Bank to recover damages for the wrongful conversion of a cheque. On March 6, 1903, a Roumanian bank drew a cheque at Braila, in Roumania, on a London bank payable to the plaintiffs or order. The same day the plaintiffs at Braila specially indorsed the cheque to G. Embiricos & Co., a London firm, and wrote to them a letter which, with the cheque, the plaintiffs placed in an envelope addressed to G. Embiricos & Co. in London. The cheque was stolen from the envelope by a clerk of the plaintiffs. On March 9, 1903, the cheque was presented at the bank of Messrs. Schelhammer & Schatterer, in Vienna, by a person who desired that it might be cashed. It then bore the indorsement G. Embiricos & Co., in addition to the special indorsement to that firm by the plaintiffs. The indorsements were apparently regular and in order, but that of G. Embiricos & Co. was in fact a forgery, though Messrs. Schelhammer & Schatterer were ignorant of the forgery. They telegraph-

(1874) 21 Wall. (U. S.) 241, 22 L. Ed. 632 (acceptance); Briggs v. Latham (1887), 36 Kans. 255, 13 Pac. 393, 59 Am. Rep. 546 (indorsement). If sent by mail it will be the place where the instrument is received by the payee. McGarry v. Nicklin, 110 Ala. 559, 17 South. 726, 55 Am. St. Rep. 40 (1895); Phipps v. Harding, 70 Fed. 468, 17 C. C. A. 203, 30 L. R. A. 513 (1895); Nashua Sav. Bank v. Sayles, 184 Mass. 520, 69 N. E. 309, 100 Am. St. Rep. 573 (1904). Unless the payee has in advance agreed to the terms of the instrument, in which event the place of delivery will be the place where the instrument is mailed. Barrett v. Dodge, 16 R. I. 740, 19 Atl. 530, 27 Am. St. Rep. 777 (1890); Garrigue v. Kellar, 164 Ind. 676, 74 N. E. 523, 69 L. R. A. 870, 108 Am. St. Rep. 324 (1905). In the absence of evidence to the contrary, a negotiable instrument will be presumed to have been executed at the place indicated by its date. Lennig v. Ralston, 23 Pa. 137 (1854); Second Nat. Bank v. Smoot, 2 MacArthur (D. C.) 371 (1876); Parks v. Evans, 5 Houst. (Del.) 576 (1879). As to a holder in due course there is a conclusive presumption to this effect. Towne v. Rice, 122 Mass. 67 (1877); Quaker City Nat. Bank v. Showacre, 26 W. Va. 48 (1885); Chemical Nat. Bank v. Kellogg, 183 N. Y. 92, 75 N. E. 1103, 2 L. R. A. (N. S.) 299, 111 Am. St. Rep. 717 (1905).

Accommodation paper is regarded as made in the state where it is first delivered for value. Tilden v. Blair, 21 Wall. 241, 22 L. Ed. 632 (1874); Gay v. Rainey, 89 Ill. 221, 31 Am. Rep. 76 (1878); Young v. Harris, 14 B. Mon. (Ky.) 556, 61 Am. Dec. 170 (1854); Davis v. Clemson, Fed. Cas. No. 3,630 (1855).

CONTINENTAL LAW.—a. *Form.*—The law of the place where the instrument is executed governs. Article 85, German Bills of Exchange Act. The law of the place of performance is of no importance in this regard. 6 R. O. H. G. 125 (May 11, 1872).

b. *Obligation and Effect.*—The general rule as to contracts prevails. In France and Italy, therefore, the law of the place of execution will, in the absence of evidence of a contrary intention or a common nationality, determine the obligation and effect of the maker's and acceptor's contracts. See French Cass. Feb. 6, 1900 (S. 1900, 1, 161), and note; article 58, Italian Com. Code. While in Germany the law of the place of performance will apply. 6 R. G. 24 (Jan. 17, 1882).

ed to the Roumanian bank, and, having ascertained from them that the cheque was in order, they cashed it, and on the same day they indorsed it to the defendants and posted it to them in London, where the defendants cashed it at the bank on which it was drawn.

According to an affidavit made as to the Austrian law by a doctor of law of the University of Vienna, "the holder of a cheque which he has bought bona fide without gross negligence and for value is identified as the proprietor of the cheque, and entitled to the proceeds thereof against all the world, notwithstanding that the cheque has been previously stolen, and notwithstanding that the indorsement has been forged."

Walton, J., gave judgment for the defendants. He held, upon the authority of Alcock v. Smith, [1892] 1 Ch. 238, that the transfer of the cheque in Vienna was governed by Austrian law, and gave the Vienna bank a good title to the cheque, which title they transferred to the defendants.

The plaintiffs appeal.

VAUGHAN WILLIAMS, L. J.[56] Walton, J., decided the case in favour of the defendants on the ground that, by the transfer of the cheque to the Vienna bank, a good title to the cheque, which the English court was bound to recognize, passed to the Vienna bank, and that that bank gave an equally good title to the defendants who, when they presented the cheque for payment to the bank on which it was drawn, were dealing with their own property and not with the plaintiffs' property. He pointed out that the only question in this action is between the original payees and the subsequent holders of the cheque, who derived their title to the cheque through an indorsement which had been forged. And that, inasmuch as under the English law no title could be made under a forged indorsement, but under the Austrian law the bona fide holder of a cheque, for which he has given value in ignorance of any flaw in the title of the transferror, is entitled to the cheque, although it has been previously stolen and the indorsements upon it have been forged, it became necessary to decide whether the validity of the transfer of this cheque ought to be governed by Austrian or by English law. Walton, J., held that the question of the validity of the transfer ought to be governed by the Austrian law, first, because it was decided by Romer, J., and on appeal by the Court of Appeal in Alcock v. Smith, [1892] 1 Ch. 238, that the ordinary rule as to the transfer of chattels which is thus stated in rule 140 of Dicey's conflict of Laws, that "assignment of a movable which can be touched (goods) giving a good title thereto according to the law of the country where the movable is situate at the time of the assignment (lex situs) is valid," applies to a bill of exchange, and, I suppose, to any negotiable instrument, and Walton, J., also seemed to be of opinion that his judgment could

[56] The concurring opinions of Romer and Stirling, L. JJ., have been omitted.

be justified by the words of section 72 of the Bills of Exchange Act, 1882. For the learned judge said that if the "interpretation" of the indorsement means the legal effect of the transfer by indorsement, it would cover this case.

I think that the view taken by Walton, J., of the effect of the decision in Alcock v. Smith, [1892] 1 Ch. 238, that the rule that the validity of the transfer of chattels must be governed by the law of the country in which the transfer takes place, applies to a bill or a cheque, and applies to the transfer of bills or cheques in cases where the transfer is by indorsement, is right; although in the case of Alcock v. Smith, [1892] 1 Ch. 238, the transfer was not by indorsement, but by process of law in the shape of a judicial arrestment. This conclusion seems sufficient to negative the cause of action in the present case, which is an action by the payee against an indorsee, who claims under a forged indorsement giving him a good title in the country where the indorsement was made.

But it would manifestly be an unsatisfactory state of the law if the legal result is that the indorsement is effective to give the indorsee of a bill a good title as against the payee, but not effective according to English law to give that indorsee a good title against the drawer or the acceptor. And it would be convenient, as well from a legal as from a commercial point of view, that it should be established that the title by such an indorsement is good as against the original parties to a negotiable instrument, having regard to the contractual liability incurred by them thereby. I do not think that Alcock v. Smith, [1892] 1 Ch. 238, decides this question; on the contrary, it seems to me that the judgments of Romer, J., and the Court of Appeal both disclaim so doing; and, further, it seems to me that the law as laid down by Pearson, J., in In re Marseilles, etc., Land Co., 30 Ch. D. 598 and by Lush, J., in Lebel v. Tucker, L. R. 3 Q. B. 77, 83 is, in effect, authority to the contrary. At all events, it has never been decided that the liability of an acceptor in England of a bill drawn abroad or of the drawer of a cheque payable in England amounts to a contract to pay on a forged indorsement valid by the foreign law, but invalid by the law of England. It may, however, be that the contract of the drawer or acceptor is to pay on any indorsement recognized by the law of England, even though that indorsement be invalid according to what I will call for convenience the local law of England. I am disposed to think that this is the true contract. If the contract of the drawer of a cheque or acceptor of a bill were limited to payment on indorsements valid by the English local law an argument might be raised that, even though the indorsement abroad was valid to legalize the possession by the indorsee claiming under the foreign indorsement, yet he would be guilty of a conversion if he used a negotiable instrument to the possession of which he was entitled for the purpose of obtaining and did obtain payment from an original party to the negotiable instrument from whom he could

not have recovered by process of law. User of a chattel by a person entitled to possession in such a manner would perhaps give a right of action for money had and received.

I, however, have come to the conclusion that as between the payees and these indorsees there is no cause of action for conversion, and that the judgment of Walton, J., must be affirmed.

It is to be observed that our decision in the present case does not increase the liability of the bank upon which the cheque was drawn and which paid the cheque. I wish to add that I am not satisfied that, having regard to the terms of subsection 2 of section 72 of the Bills of Exchange Act, 1882, that section is conclusive of the present case, and I do not think that section 24 governs the case of an indorsement abroad.[57]

LEBEL v. TUCKER.

(Queen's Bench, 1867. 3 Q. B. 77, 37 L. J. Q. B. 46.)

LUSH, J.[58] The action is on a bill drawn, accepted, and payable, in England, and which is therefore an inland bill; and the action is brought by persons claiming the right to sue by title derived from the drawers and payees according to the English law. The defence is, that the indorsement was made in France, and is not conformable to the law of France, which requires that the indorsement should bear a date, and express the consideration for the indorsement and the name of the indorsee. The question is, is that any answer to an action against the acceptor of an English bill? The circumstances are somewhat novel, but the principle applicable is not novel; it existed before, and is well established by the decision in Trimbey v. Vignier, 1 Bing. N. C. 151, viz., that contracts must be governed by the law of the country where they are made. Now, the contract on which the present defendant, the acceptor, is sued, was made in England. The contract which the drawer proposes is this: He says: "Pay a certain sum at a certain date to my order." The acceptor makes this contract his own by putting his name as acceptor, and his contract, if expanded in words, is: "I undertake at the maturity of the bill to pay to the person who shall be the holder under an indorsement from you, the payee, made according to the law merchant." How can that contract of the acceptor be varied by the circumstance that the indorsement is made in a country where the law is different from the law of England? The bill retains its original character; it remains an inland bill up to the time of its maturity, and is negotiable according to

[57] Whether the legal or only the equitable title passes depends upon the law of the place of indorsement, and not upon the law of the forum. Levy v. Levy, 78 Pa. 507, 21 Am. Rep. 35 (1875).

[58] The statement of facts and the concurring opinion of Mellor, J., have been omitted.

English law; and by the English law a simple indorsement in blank transfers the right to sue to the holder. This principle is pointedly applied by the judgment in Trimbey v. Vignier, 1 Bing. N. C. 151. My brother Hayes is mistaken in supposing that the judgment deals simpliciter with the place of the indorsement, without reference to the fact of the instrument itself being a French note; on the contrary, that fact lies at the very bottom of the decision. Thus, at the very commencement of the judgment Tindal, C. J., after saying that the point reserved was, whether the plaintiff, under the circumstances stated in the case, was entitled to maintain the action in an English court of law in his own name, proceeds: "The promissory note was made by the defendant in France; and it was indorsed in blank by the payee in that country; each of the parties, the maker and the payee, being at the respective times of making and indorsing the note domiciled in that country. The first inquiry, therefore, is, whether this action could have been maintained by the plaintiff against the defendant in the courts of law in France." He then discusses what is the law of France, and comes to the conclusion that the plaintiff, the indorsee, could not have sued the maker in his own name in the courts of France; and proceeds: "The question, therefore, becomes this: Supposing such rule to prevail in the French courts by the law of that country, is the same rule to be adopted by the English courts of law, when the action is brought here, the law of England, applicable to the case of a note indorsed in blank in England, allowing the action to be brought in the name of the holder? The rule which applies to the case of contracts, made in one country and put in suit in the courts of law of another country, appears to be this, that the interpretation of the contract must be governed by the law of the country where the contract was made (lex loci contractus), the mode of suing, and the time within which the action must be brought, must be governed by the law of the country where the action is brought." He then cites authorities for this position, and concludes: "The question, therefore, is, whether the law of France, by which the indorsement in blank does not operate as a transfer of the note, is a rule which governs and regulates the interpretation of the contract, or only relates to the mode of instituting and conducting the suit. * * * And we think the French law on the point above mentioned is the law by which the contract is governed, and not the law which regulates the mode of suing. * * * If the indorsement has not operated as a transfer, that goes directly to the point that there is no contract upon which the plaintiff can sue. * * * We think that our courts of law must take notice that the plaintiff could have no right to sue in his own name upon the contract in the courts of the country where such contract was made; and that such being the case there, we must hold in our courts that he can have no right of suing here." The judgment, therefore, proceeds on the ground that the contract, that is, the contract of the maker of the note, having been made in France, it must be governed by the law of France. So here, the contract of the acceptor, having been

made in England, must be governed by the English law. It would be anomalous to say that a contract made in this country could be affected by the circulation and negotiation in a foreign country of the instrument by which the contract is constituted. The original contract cannot be varied by the law of any foreign country through which the instrument passes. Therefore, as it seems clear to me, the plaintiffs are entitled to judgment. It is not necessary to consider what would be the effect of this indorsement as against the indorser, if sued in France; probably, the courts of France would hold that the English law governed. All we decide is, that, the acceptor having contracted in England to pay in England, the contract must be interpreted and governed by the law of England, and that the plaintiffs have acquired a right to sue.

Judgment for the plaintiffs.[59]

WOODRUFF v. HILL.

(Supreme Judicial Court of Massachusetts, 1874. 116 Mass. 310).

Contract upon a promissory note for $1,352.70. At the trial in the superior court, before Putnam, J., the plaintiffs offered evidence tending to prove that the defendants made the note, and that the payees indorsed it before maturity to the plaintiffs, who paid to the payees at the time of the indorsement, and as the consideration therefor, $699.48 in cash, and credited the payees with $629.55, in payment of a pre-existing debt due from them to the plaintiffs, the balance of said note amounting to $23.67, being charged and allowed for interest. The payees of the note and the plaintiffs are residents of New York, and the indorsement was made in that state. The defendants are residents of Boston, in this commonwealth, and the note was made and was payable in Boston.

The defendants offered to prove that by the law of New York the plaintiffs, upon the above evidence, were not bona fide holders for value except as to the amount of the money paid by them to the payees at the time of the indorsement; that the note was given by them without consideration to the payees, they agreeing not to use the same except as collateral to their own note, to raise money upon; and that, as between them and the payees, the transfer of the note to the plaintiffs was fraudulent. The defendants did not contend that the plaintiffs

[59] But see Bradlaugh v. De Rin, L. R. 3 C. P. 538 (1868). Compare English Bills of Exchange Act, § 72, 2.

Article 85, German Bills of Exchange Act, provides that, if the formal requisites of a contract placed upon a foreign bill or note conform to German law, it shall be binding in favor of all who subsequently become parties to such instrument in Germany; and if the parties to such foreign contract are Germans, it suffices that, as regards form, the provisions of the German law have been observed.

had any knowledge of the want of consideration of the note, or of the purpose for which it was given.

The judge ruled that the facts offered by the defendants would not, if proved, constitute a defence, and that the law of this commonwealth and not the law of New York governed, and instructed the jury to return a verdict for the plaintiffs for the whole amount of the note. The defendants alleged exceptions.

GRAY, C. J. The note was made in Massachusetts, and the contract of the makers with the payees and with any indorsee thereof was to be performed here, and governed by our law. Story, Confl. Laws, §§ 317, 344, 345. By that law, the facts offered to be proved at the trial constituted no defence. Blanchard v. Stevens, 3 Cush. 162, 50 Am. Dec. 723. Exceptions overruled.[60]

AMSINCK v. ROGERS.

(Court of Appeals of New York, 1907. 189 N. Y. 252, 82 N. E. 134, 121 Am. St. Rep. 858, 12 L. R. A. [N. S.] 875.)

This action was brought against the drawers of the following instrument:

"New York, Jan. 8, 1901.

"Exchange for £2,058. 6/8.

"On demand of this original cheque (duplicate unpaid) pay to the order of Rogers, Brown & Company twenty-two hundred and fifty-eight pounds 6/8, payable at rate for bankers' cheques on London, value received, and charge the same to account of pig iron per S. S. Quarnero. Rogers, Brown & Co.

"To Mess. A. Herm. Fraenckl Soehne, Ruepgasse, Vienna, Austria.

"No. 75."

The instrument was drawn, indorsed, and transferred to plaintiffs in New York. It was not paid by the drawees, and Rogers, Brown & Co. refused to pay upon the ground that there was not a proper protest and notice of protest. A judgment for defendants was affirmed by the Appellate Division (93 N. Y. Supp. 87, 103 App. Div. 428), and plaintiffs appeal.[61]

HISCOCK, J.[62] * * * It is practically conceded by the learned counsel for the appellants that, if the latter's obligation to cause protest and notice of protest of this bill is to be measured by the laws of

[60] See, also, King v. Doolittle, 1 Head (Tenn.) 77 (1858); Webster v. Howe Mach. Co., 54 Conn. 394, 8 Atl. 482 (1886); Brook v. Vannest, 58 N. J. Law, 162, 33 Atl. 382 (1895); Limerick Nat. Bank v. Howard, 71 N. H. 13, 51 Atl. 641, 93 Am. St. Rep. 489 (1901).

[61] This brief statement of facts has been substituted for that of the original report.

[62] Part of the opinion is omitted.

New York where it was drawn and transferred by respondents, there has been a failure of necessary steps which prevents a recovery. Recognizing this, he sought, as already suggested, to introduce evidence establishing a different and less rigorous obligation upon the part of the appellants. This evidence was to the general effect that in Austria, where the same was payable, the instrument involved was not a bill of exchange nor a check, but a "commercial order" for the payment of money which was negotiable, and which might be presented as often as occasion arose; each presentment being legally good as any other, and no protest or notice of dishonor to the drawer being required. In connection with the rejection of this testimony, which presents the only questions upon this appeal, appellants' counsel has seemed to argue the proposition, broader than the evidence offered, that the rights of the drawer of a bill of exchange to protest and notice are governed by the laws of the place where the bill is payable, upon the assumption that in this case such view would excuse the omissions complained of by respondents. We shall first discuss this general proposition so urged, and, as we believe, shall demonstrate that the weight of authority is that the rights and obligations of the drawer of a bill of exchange are determined and fixed by the law of the place where he draws it, and, as in this case, transfers it, and that he is discharged by failure to protest the same in accordance with the laws of that place; such failure being due to different laws or customs prevailing in the country where the bill is payable.

It is familiar law that the contracts of the different parties to a bill of exchange are independent and carry different obligations. The drawer of such a bill does not contract to pay the money in the foreign place on which it is drawn, but only guarantees its acceptance and payment in that place by the drawee, and agrees, in default of such payment, upon due notice, to reimburse the holder in principal and damages at the place where he entered into the contract. His contract is regarded as made at the place where the bill is drawn, and as to its form and nature and the obligation and effect thereof is governed by the law of that place in regard to the payee and any subsequent holder. Story on Bills of Exchange, §§ 131, 154. While as to certain details, such as the days of grace, the manner of making the protest, and the person by whom protest shall be made, the law or custom of the place where it is payable will govern, the necessity of making a demand and protest and the circumstances under which the same may be required or dispensed with are incidents of the original contract which are governed by the law of the place where the bill is drawn, rather than of the place where it is payable. They constitute implied conditions upon which the liability of the drawer is to attach according to the lex loci contractus. Id. §§ 155, 175. These principles have been affirmed and enunciated by so many decisions that it would be out of place to attempt a general review of the latter, and citation may be made simply of the following cases outside of this

state: Powers v. Lynch, 3 Mass. 77, 80; Potter v. Brown, 5 East, 124; Price v. Page, 24 Mo. 65; Hunt v. Standart, 15 Ind. 33, 38, 77 Am. Dec. 79; Raymond v. Holmes, 11 Tex. 54, 59; Allen v. Kemble, 6 Moore's Privy Council Cases, 6.

Since, however, it is contended by the learned counsel for the appellants that the views expressed by Story are in direct opposition to the decisions in this state, a somewhat more extended reference will be made to the latter, and with the result, we apprehend, of quite conclusively demonstrating that the current of their authority has been misjudged.

[The learned justice here commented upon Aymar v. Sheldon, 12 Wend. 439, 27 Am. Dec. 137, Allen v. Merchants' Bank of New York, 22 Wend. 215, 34 Am. Dec. 289, Carroll v. Upton, 2 Sandf. 171, Artisans' Bank v. Park Bank, 41 Barb. 599, and Susquehanna Valley Bank v. Loomis, 85 N. Y. 207, 39 Am. Rep. 652, and continued as follows:]

Counsel for appellants especially relies upon two cases to sustain his proposition that the rules laid down by Story have not been adopted in this state. The first of these cases is that of Everett v. Vendryes, 19 N. Y. 436. This was an action by the indorsee against the drawer of a bill of exchange drawn in New Granada upon a corporation having its office in this state. It was payable to the order of one Jimines, indorsed by him at Cartagena, and was protested for nonacceptance. The answer denied the indorsement of Jimines in general terms. The plaintiffs claimed to be the indorsees according to the legal effect of the bill. The indorsement was not good and sufficient according to the laws of New Granada, but was so according to those of New York. The question therefore was whether for the purpose of bringing an action against the drawer of the bill upon nonacceptance by the drawee in New York state the indorsement was to be tested by the laws of New Granada, where it was made, or by the laws of New York, where the bill was payable. It was held that the laws of New York should govern, and Judge Denio, in writing for the court, said: "I have not been able to find any authority for such a case, but I am of opinion that upon the reason of the thing the laws of this state should be held to control. These laws are to be resorted to in determining the legal meaning and effect and the obligation of the contract. All the cases agree in this. In this case the point to be determined was whether the plaintiffs were indorsees and entitled to receive the amount of the bill of the drawees. This was to be determined, in the first instance, when the bill was presented for acceptance and payment in New York. The plaintiff's title was written on the bill. The question was whether it made them indorsees according to the effect of the words of negotiability contained in the bill itself. Those words and the actual indorsement were to be compared, and the legal rules to be employed in making that comparison were found in the law merchant of the state of New York, and by those rules the indorsement was precisely such a one as the bill contemplated Besides, it is reasonable to suppose that, in addressing this bill to the

drawees in New York, the defendant contemplated that they would understand the words of negotiability according to the law of their own country. * * * When, therefore, he directed the drawees to pay to the order of the payee, he must be intended to contemplate that whatever would be understood in New York to be the payee's order was the thing which he intended by that expression in the bill." In other words, it was held that the indorsement was made for the purpose of enabling the indorsee to present and collect the note in New York, and that an indorsement which was effective for that purpose under the laws of the state where performance would be sought was sufficient. It does not seem to us that this decision in any way conflicts with those to which we have already referred. It is true that the learned judge commences his opinion with some general observations as to the principles conceived to be applicable in ascertaining the nature and interpretation of a bill of exchange. Such observations, however, constituted nothing more than a dictum, and were not sufficient in our opinion to outweigh the authorities to which we have already referred.

The case of Hibernia Nat. Bank v. Lacombe, 84 N. Y. 367, 38 Am. Rep. 518, involved consideration of a draft drawn in New Orleans upon New York bankers. The case was disposed of upon the theory that the instrument was a check, which, of course, was the fact, and the obligations of the drawer of a check, as stated in the opinion, are entirely different from those of the drawer of a bill of exchange. The former undertakes that the drawee will be found at the place where he is described to be, and that the sum specified will be paid to the holder when the check is presented, and if not so paid, and he is notified, he becomes absolutely bound to pay the amount at the place named. In other words, the drawer of a check contracts to pay at the place where the check is payable, instead of, as the drawer of a bill of exchange does, at the place where the instrument is drawn. It is not therefore in conflict with our views to hold that the rights of the parties in the case of such a check should be determined by the law of the place of payment; in other words, the place of performance by the drawer.

Our attention is also called to the case of Union Nat. Bank of Chicago v. Chapman, 169 N. Y. 538, 62 N. E. 672, 57 L. R. A. 513, 88 Am. St. Rep. 614, but we do not think that what is there said conflicts with the views we have expressed. In speaking of the general rules governing the construction of a contract, it is said: "All matters connected with its performance including presentation, notice, demand, etc., are regulated by the law of the place where the contract by its terms is to be performed."

In the first place, if we have correctly measured the weight of authority, it establishes the proposition that respondents' contract as drawers was to be performed in New York, where the bill was drawn, and therefore the rule quoted, if applicable, would lead to the conclusion that demand and protest so far as they were concerned would be governed by the laws of New York. In the second place, the question in-

volved in the Chapman Case was not at all akin to that presented here, and we do not believe that the judge there writing intended to approve the rule that as against drawers in New York of a bill of exchange entire omission of protest might be justified by local customs and usages in a foreign country. We think that he had in mind certain comparatively inconsequential details of the manner and method of making demand and protest, and which, as we have already seen, may be affected by local custom and usage, rather than the entire omission of these important acts. This estimate of what was intended is confirmed by the case of Scudder v. Union Nat. Bank, 91 U. S. 406, 412, 23 L. Ed. 245, which is especially cited as an authority for what was being said. In the latter case it is written: "The rule is often laid down that the law of the place of performance governs the contract. * * * For the purposes of payment and the incidents of payment this is a sound proposition. Thus, the bill in question is * * * in law a sight draft. Whether a sight draft is payable immediately upon presentation, or whether days of grace are allowed, and to what extent, is differently held in different states. The law of Missouri, where this draft is payable, determines that question in the present instance. The time, manner, and circumstances of presentation for acceptance or protest, the rate of interest when this is not specified in the bill (citations), are points connected with the payment of the bill, and are also instances to illustrate the meaning of the rule, that the place of performance governs the bill."

Thus far we have assumed that the instrument in suit was a bill of exchange, but we have also considered whether the drawer's rights to protest and notice were governed by the laws of Austria as though the adoption of the view that they were so governed would excuse omission of those steps. As a matter of fact, however, the appellants would not be benefited if we should hold, in this connection, that the laws of Austria did control, for no evidence was received or offered that the drawers of a bill of exchange would not be entitled to the same protest and notice under the laws of that country as under those of New York. Appellants' only excuse for the omission of these steps rests upon the final proposition that this is not a bill of exchange at all, nor even a check, but is what is known in Austria as a "commercial order" for the payment of money of which no protest need be made. Support for this proposition, it is said, would have been found in the rejected evidence which would have established as the Austrian law that a bill of exchange must be so designated in the body of the instrument itself, and that such designation by mere superscription as was found upon the instrument in suit is not sufficient. Therefore, on a close and final analysis of appellants' argument it is indispensable that they should convince us that their rejected evidence would have established that this was not to be regarded as a bill of exchange, but as a commercial order. We shall assume that under the Austrian law it was a commercial order. On the other hand, there is no doubt, and in fact it is not

denied by the learned counsel for the appellants, that it was a bill of exchange under the laws of the state of New York.

The negotiable instruments law (Laws 1897, p. 745, c. 612, as amended) provides as follows:

"Sec. 210. Bill of Exchange Defined.—A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed determinable future time a sum certain in money to order or to bearer."

"Sec. 213. Inland and Foreign Bills of Exchange.—An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this state. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill."

"Sec. 321. Check Defined.—A check is a bill of exchange drawn on a bank payable on demand."

It sufficiently appears that this bill was drawn upon a business house and was not a check. It was therefore a foreign bill of exchange according to the laws of New York. And so, again, we are confronted with the inquiry whether the rights of these respondents as to the nature of this instrument shall be measured by the laws of New York or by those of Austria. It seems to us clear that it must be the former. The parties had their places of business in New York. The bill was there drawn and negotiated and transferred to the appellants. The contract of the respondents was executed and consummated there, and, as we have already seen, was to be performed there upon default of the drawees. The law of New York surrounded the parties and the execution of their contract, and in our judgment it would be, not only erroneous, but highly unreasonable, to hold that they contracted with reference to any law other than that of New York, or intended that their contract should be other than that which such law made it—a bill of exchange. The authorities which already have been cited with reference to the contract and rights of the drawer of a bill of exchange are amply sufficient to sustain this view.

Lastly, it is suggested that the decision which we are making will impose much trouble and responsibility upon those who are held for the proper demand and protest of paper in foreign countries where commercial laws and usages differ from our own. We do not see much balance of weight in favor of this argument, even if it is to be considered. In a case like this, there would be no great difficulty in forwarding with the bill instructions for its proper protest such as were finally given. Some such precautions would not be more onerous than would those otherwise imposed upon a party to a New York bill of ascertaining the law of the foreign country where it was payable in order that he might learn in what manner the rights secured to him where his contract was made would be altered and perhaps materially impaired.

Therefore we conclude that no error was committed to the prejudice of appellants, and that the judgment appealed from should be affirmed, with costs.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, and CHASE, JJ., concur. VANN, J., dissents.

Judgment affirmed.[63]

AYMAR v. SHELDON.

(Supreme Court of New York, 1834. 12 Wend. 439, 27 Am. Dec. 137.)

Error from the Superior Court of the City of New York. Sheldon and others, as endorsees, brought a suit against B. & I. Q. Aymar, as endorsers of a bill of exchange, bearing date 4th June, 1830, drawn by V. Cassaigne & Co. St. Pierre, at Martinique, on L'Hotelier Frères, at Bordeaux in France, for 4,000 francs, payable at 24 days sight, to the order of B. Aymar & Co., the name of the firm of B. & I. Q. Aymar. The plaintiffs set forth the endorsement of the bill of exchange at the city of New York, where, they averred, that they and the defendants, all being citizens of the United States at the time of the endorsement, respectively dwelt and had their homes; and then aver that on the 11th August, 1830, the bill of exchange was presented to L'Hotelier Frères, at Bordeaux for acceptance, according to the custom of merchants, and that they refused to accept; whereupon the bill was duly protested for nonacceptance, and notice given to the defendants. The defendant pleaded: 1. Non assumpsit; 2. That the bill declared on was made and drawn in the island of Martinique, a country then, since and now, under the dominion and government of the king of France, by persons there dwelling subjects of the king of France; and that the bill, according to its tenor was payable at Paris in the kingdom of France, by persons then and still residing and dwelling at Bordeaux, in the kingdom of France, subjects of the king of France, to wit, on, etc., at, etc.; that the island of Martinique, as well as Paris and Bordeaux, and the persons therein respectively residing, and the drawers and drawees were subject and governed by the laws of the kingdom of France, there

[63] Accord: Cass. Florence, April 8, 1895 (S. 1896, 4, 7).

With reference to indorsers the negotiability of the instrument has been determined with reference to the law of the place of indorsement. Nichols's Ex'r v. Porter, 2 W. Va. 13, 94 Am. Dec. 501 (1867); Hyatt v. Bank of Kentucky, 8 Bush (Ky.) 193 (1871).

To the effect that the law of the place where the bill of exchange is drawn, and not the law of the place where it is payable, will determine the conditions precedent to the drawer's liability, see Raymond v. Holmes, 11 Tex. 54 (1853); Warner v. Citizens' Bank of Parker, 6 S. D. 152, 60 N. W. 746 (1894). So as to damages. Bank of the United States v. United States, 2 How. (U. S.) 711, 746, 11 L. Ed. 439, 453 (1844); Crawford v. Branch Bank at Mobile, 6 Ala. 12, 41 Am. Dec. 33 (1844); Price v. Page, 24 Mo. 65 (1856); Kuenzi v. Elvers, 14 La. Ann. 391, 74 Am. Dec. 434 (1859).

and then, and still existing and in force, to wit, on etc., at etc.; that by the laws of France, then and still at the several places in the plea mentioned, existing and in force, it is established, enacted and provided, in relation to bills of exchange drawn and payable in the countries, subject to the laws of France, among other things, in manner and form following, namely: The drawer and endorsers of a bill of exchange are severally liable for its acceptance and payment at the time it falls due. Code de Commerce, 119. The refusal of acceptance is evidenced by an act denominated protest for nonacceptance. Id. 120. On notice of the protest for nonacceptance, the endorsers and drawer are respectively bound to give security, to secure the payment of the bill at the time it falls due, or to effect reimbursement of it, with the expense of protest and re-exchange. The time when a bill of exchange becomes due, if payable at one or more days after sight, is fixed by the date of the acceptance, or by the date of the protest for nonacceptance. The holder is not excused the protest for nonpayment by the protest or nonacceptance. After the expiration of the above periods (certain periods specified in the Code, and which, in the case of a bill drawn in the West Indies on France, is one year), for the presentment of bills at sight, or one or more days after sight, for protest of nonpayment, the holder of the bill loses all his claim against his endorsers, etc., setting forth, besides the above, a variety of other provisions of the French Code, relative to bills of exchange, and then averring, that although at the time of the commencement of the action of the plaintiffs, twenty-four days after sight of the bill of exchange declared on had elapsed, from the day when the same was alleged to have been protested for nonacceptance, yet no protest of the said bill for nonpayment had been made, concluding with a verification and prayer of judgment. 3. The defendants pleaded, after referring to the matter of inducement stated in the second plea, that on notice of protest for nonacceptance, as alleged in the declaration, they were ready and willing to give security; and offered to the plaintiffs to give security, according to the true intent and meaning of the laws of France, to secure payment of the bill at the time when the same should fall due, to wit, on, etc., at, etc., concluding as in last plea. To the second plea the plaintiffs demurred, and took issue upon the third, denying that the defendants did offer security, etc.

The superior court on the argument of the demurrer, adjudged the second plea to be bad; after which the issues of the fact were tried. The jury found for the plaintiffs, on the plea of nonassumpsit, and assessed their damages at $895.52, and found a verdict for the defendants on the third plea. Notwithstanding which last finding, the court gave judgment for the plaintiffs on the whole record. The defendants sued out a writ of error.

NELSON, J. The only material question arising in this case is, whether the steps necessary on the part of the holders of the bill of exchange in question, to subject the endorsers upon default of the drawees to ac-

cept, must be determined by the French law, or the law of this state. If by our law, the plaintiffs below are entitled to retain the judgment; if by the law of France, as set out and admitted in the pleadings, the judgment must be reversed.

We have not been referred to any case, nor have any been found in our researches, in which the point now presented has been examined or adjudged. But there are some familiar principles belonging to the law merchant, or applicable to bills of exchange and promissory notes, which we think are decisive of it. The persons in whose favor the bill was drawn were bound to present it for acceptance and for payment, according to the law of France, as it was drawn and payable in French territories; and if the rules of law governing them were applicable to the endorsers and endorsees in this case, the recovery below could not be sustained, because presentment for payment would have been essential even after protest for nonacceptance. No principle, however, seems more fully settled, or better understood in the commercial law, than that the contract of the endorser is a new and independent contract, and that the extent of his obligations is determined by it. The transfer by endorsement is equivalent in effect to the drawing of a bill, the endorser being in almost every respect considered as a new drawer. Chitty on Bills, 142; Ballingalls v. Gloster, 3 East, 482; Heylyn v. Adamson, 2 Burr. 674, 675; Bomley v. Frazier, 1 Str. 441; Selw. N. P. 256. On this ground, the rate of damages in an action against the endorser is governed by the law of the place where the endorsement is made, being regulated by the lex loci contractus. Field v. Holland, 6 Cranch (U. S.) 21, 3 L. Ed. 136; 2 Kent's Comm. 460; Hendricks v. Franklin, 4 Johns. 119. That the nature and extent of the liabilities of the drawer or endorser are to be determined according to the law of the place where the bill is drawn or endorsement made, has been adjudged both here and in England. In Hicks v. Brown, 12 Johns. 142, the bill was drawn by the defendant, at New Orleans, in favor of the plaintiff, upon a house in Philadelphia; it was protested for nonacceptance, and due notice given; the defendant obtained a discharge under the insolvent laws of New Orleans after such notice, by which he was exonerated from all debts previously contracted, and in that state, of course from the bill in question. He pleaded his discharge, here, and the court say: "It seems to be well settled, both in our own and in the English courts, that the discharge is to operate according to the lex loci upon the contract where it was made or to be executed. The contract in this case originated in New Orleans, and had it not been for the circumstance of the bill being drawn upon a person in another state, there could be no doubt but the discharge would reach this contract; and this circumstance can make no difference, as the demand is against the defendant as drawer of the bill, in consequence of the nonacceptance. The whole contract or responsibility of the drawer was entered into and incurred in New Orleans." The case of Potter v. Brown, 5 East, 124, contains a similar principle. See, also, Powers v. Lynch, 3 Mass.

81; Van Raugh v. Van Arsdaln, 3 Caines, 154, 2 Am. Dec. 259; Sherrill v. Hopkins, 1 Cow. 107; Slacum v. Pomery, 6 Cranch (U. S.) 221, 3 L. Ed. 204; Andrews v. Herriot, 4 Cow. 512, note.

The contract of endorsement was made in this case, and the execution of it contemplated by the parties in this state; and it is therefore to be construed according to the laws of New York. The defendants below, by it, here engage that the drawees will accept and pay the bill on due presentment, or, in case of their default and notice, that they will pay it. All the cases which determine that the nature and extent of the obligation of the drawer are to be ascertained and settled according to the law of the place where the bill is drawn, are equally applicable to the endorser; for, in respect to the holder, he is a drawer. Adopting this rule and construction, it follows that the law of New York must settle the liability of the defendants below. The bill in this case is payable 24 days after sight, and must be presented for acceptance; and it is well settled by our law, that the holder may have immediate recourse against the endorser for the default of the drawee in this respect. Mason v. Franklin, 3 Johns. 202; Chitty on Bills, 231, and cases there cited.

Upon the principle that the rights and obligations of the parties are to be determined by the law of the place to which they had reference in making the contract, there are some steps which the holder must take according to the law of the place on which the bill is drawn. It must be presented for payment when due, having regard to the number of days of grace there, as the drawee is under obligation to pay only according to such calculation; and it is therefore to be presumed that the parties had reference to it. So the protest must be according to the same law which is not only convenient, but grows out of the necessity of the case. The notice, however, must be given according to the law of the place where the contract of the drawer or endorser, as the case may be, was made, such being an implied condition. Chitty on Bills, 266, 93, 217; Bayley, 28; Story's Conflict of Laws, 298.

The contract of the drawers in this case, according to the French law, was that if the holder would present the bill for acceptance within one year from date, it being drawn in the West Indies, and it was not accepted, and was duly protested, and notice given of the protest, he would give security to pay it, and pay the same if default was also made in the payment by the drawee after protest and notice. This is the contract of the drawers, according to this law, and the counsel for the plaintiffs in error insists that it is also the implied contract of the endorser in this state. But this cannot be, unless the endorsement is deemed an adoption of the original contract of the drawers, to be regulated by the law governing the drawers, without regard to the place where the endorsement is made. We have seen that this is not so; that notice must be given according to the law of the place of endorsement; and if, according to it, notice of nonpayment is not required, none of course is necessary to charge the endorser. But if the above

position of the plaintiffs in error be correct, notice could not then be dispensed with, the law of the drawer controlling. The above position of the counsel would also be irreconcilable with the principle, that the endorsement is equivalent to a new bill, drawn upon the same drawee; for then the rights and liabilities of the endorser must be governed by the law of the place of the contract, in like manner as those of the drawer are to be governed by the laws of the place where his contract was made. Both stand upon the same footing in this respect, each to be charged according to the laws of the country in which they were at the time of entering into their respective obligations.

I am aware that this conclusion may operate harshly upon the endorsers in this case, as they may not be enabled to have recourse over on the drawers. But this grows out of the peculiarity of the Commercial Code which France has seen fit to adopt for herself, materially differing from that known to the law merchant. We cannot break in upon the settled principles of our commercial law, to accommodate them to those of France or any other country. It would involve them in great confusion. The endorser, however, can always protect himself by special endorsement, requiring the holder to take the steps necessary according to the French law, to charge the drawer. It is the business of the holder, without such an endorsement, only to take such measures as are necessary to charge those to whom he intends to look for payment.

Judgment affirmed.[64]

[64] So as to the necessity of demand, protest, and notice for nonpayment at the time of maturity. Holbrook v. Vibbard, 2 Scam. (Ill.) 465 (1840); Allen v. Merchants' Bank of New York, 22 Wend. 215, 34 Am. Dec. 289 (1839); Read v. Adams, 6 Serg. & R. (Pa.) 356 (1821); Douglas v. Bank of Commerce, 97 Tenn. 133, 36 S. W. 874 (1896).

So as to necessity of previous suit against the maker or acceptor. Williams v. Wade, 1 Metc. (Mass.) 82 (1840); Hunt v. Standart, 15 Ind. 33, 77 Am. Dec. 79 (1860); Rose v. Park Bank, 20 Ind. 94, 83 Am. Dec. 306 (1863). Or the want of consideration. Wood v. Gibbs, 35 Miss. 559 (1858). Or the defense of usury. Glidden v. Chamberlin, 167 Mass. 486, 46 N. E. 103, 57 Am. St. Rep. 479 (1897). If the instrument is drawn or indorsed for accommodation, however, the defense of usury will be governed by the law of the place where it was first delivered for value. Davis v. Clemson, Fed. Cas. No. 3,630 (1855).

So the amount of recovery as against the drawer or indorser will be determined by the law applicable to their respective contracts. Slacum v. Pomery, 6 Cranch (U. S.) 221, 3 L. Ed. 204 (1810); Gibbs v. Fremont, 9 Exch. 25. Contra: Bank of Illinois v. Brady, 3 McLean, 268, Fed. Cas. No. 888 (1843); Mullen v. Morris, 2 Pa. 85 (1845); Peck v. Mayo, 14 Vt. 33, 39 Am. Dec. 205 (1842).

The presumptive intent of the parties, however, has been held to be the ultimate criterion of the indorser's liability. Vanzant v. Arnold, 31 Ga. 210 (1860).

WOOLEY v. LYON.

(Supreme Court of Illinois, 1886. 117 Ill. 244, 6 N. E. 885, 57 Am. Rep. 867.)

SHELDON, J.* This action was brought by Lyon, as indorsee, against Wooley, as indorser, of two promissory notes, one for $632.36, the other for $626.85, both dated July 9, 1875, one payable in 60, the other in 90, days, made by Dobbins & Co., and payable to the order of Wooley, at the maker's office in Chicago, Illinois. Upon the trial in the court below there appeared upon the notes, over the indorsement of Wooley, the following: "Pay to order of Thos. R. Lyon." There also appeared the following: "Without recourse. Orrin W. Potter, as Executor Estate E. B. Ward." The plaintiff had judgment for the amount of the notes, which was affirmed by the appellate court for the second district and the defendant brings this writ of error. The errors which are here insisted upon are in respect of instructions to the jury. The notes were indorsed in blank by Wooley, and were negotiated by him, so indorsed in Michigan, having been sent after some correspondence, from Fruitport, Michigan, to Ludington, Michigan, in payment for lumber purchased by Wooley of the estate of E. B. Ward, or, rather in payment of two other similar notes which had been so given by Wooley for lumber. * * *

The sixth instruction given for the plaintiff is objected to, which was to the effect that if, after the maturity of the notes, the defendant was informed of their non-payment, and, being so informed acknowledged his liability as indorser, and agreed to settle or pay the amount due, then it is immaterial, under the Michigan law, whether the protest was legal or proper. This instruction, if faulty, could have done the defendant no harm, for the reason that the necessary steps under the law of this state were taken to charge defendant as indorser, viz., demand of payment, protest for non-payment, and notice of non-payment addressed to defendant at a proper place, all which the evidence shows were duly made and given in accordance with our own law, where the defendant's liability became fixed, and it was immaterial whether or not he made a subsequent promise to pay the notes. The notes being payable in this state, and the contract of indorsement being made in Michigan, and the indorser residing there, the law of the place where the notes were payable we consider governed as to time and mode of presentment for payment, manner of protests, and giving notice. 2 Pars. Notes & Bills, 344, 345; 1 Daniel. Neg. Inst. §§ 911, 912; Rothschild v. Currie, 1 Adol. & E. (N. S.) 43; Hirschfeld v. Smith, L. R. 1 C. P. 350. There is a conflict of authority as to what law should govern in the giving of notice of dishonor—whether the law of the place of payment or the law of the place where the indorsement is made. Aymar v. Sheldon, 12 Wend. (N. Y.) 439, 27 Am. Dec. 137,

*A part of the opinion has been omitted.

and some other American cases, hold the notice should be according to the law of the place of the indorsement; and see Redf. & B. Lead. Cas. Bills & Notes, 712, in note to above case of Aymar v. Sheldon. We are disposed to adopt the rule that the notice should be in accordance with the law of the place where the bill or note is made payable, as resting upon the better reason. * * *†

ROUQUETTE v. OVERMANN.

(Queen's Bench, 1875. L. R. 10 Q. B. 525, 44 L. J. Q. B. 221.)

Plaintiff is the indorsee and holder, defendants the drawers and indorsers, of the following bill of exchange:

"Manchester, 28 June, 1870, for £345. 15s. 2d. sterling. On the 5th of October, 1870, pay this first of exchange (second and third unpaid) to the order of ourselves the sum of £345. 15s. 2d. sterling, at the exchange as per indorsement, for value received, which place to account as advised. Overmann & Schou.

"To Messrs. Magalhaes Frères, 5 Rue Martel, Paris."

The bill was indorsed in England by defendants, who were merchants in Manchester, to plaintiff, an English subject, carrying on business in London. Plaintiff indorsed the bill to Messrs. Krauetler & Mieville, English subjects and residents of England, who indorsed the bill in London to Messrs. Pillet, Will & Co., French subjects and residents of Paris. The bill was duly accepted by the drawees at their place of business in Paris. During the currency of the bill, viz. from July 23, 1870, to January 20, 1871, France and Prussia were at war. As a consequence, through different legislative enactments beginning with that of August 13, 1870, the time of presentment, protest, and notice of negotiable paper issued before the promulgation of such law was extended, and the right of recourse against the indorsers and other parties postponed, until September 5, 1871. On that date Pillet, Will & Co. presented the bill for payment, which was refused. The bill was duly protested for nonpayment on September 6, 1871. Notice of dishonour and protest was given by the holder to Krauetler & Mieville on September 8, 1871, in manner required by French law, and was received by them on September 9th. On the same day they gave the like notice to the plaintiff, and he on the same day gave the like notice to defendants, who refused to pay the bill. The plaintiff paid the bill, before action, to Krauetler & Mieville, and now sues to recover the sum so paid, with interest. Defendants had no notice that the bill had not been presented for payment prior to September 6, 1871, nor of any of the laws or proclamations of the French government.[65]

† Contra, and in favor of the law of the place of drawing or indorsement, Snow v. Perkins, 2 Mich. 238 (1851); Thorp v. Craig, 10 Iowa, 461 (1860).

[65] This statement of facts has been substituted for that of the original report.

COCKBURN, C. J.[66] * * * The main ground for the defence is that due diligence was not used by the holders of the bill in presenting it for payment at the appointed time, or in giving notice of dishonour on its nonpayment at that time; by reason of which the indorsers were discharged; whence, as was contended, it followed that the plaintiff had paid the bill in his own wrong, and therefore could not claim to be indemnified by the defendants; who, again, it was said, were entitled on their own account to notice of dishonour on nonpayment at the regular time—it being contended that whatever might be the effect of this special legislation of the French government, as between the holders of the bill and the acceptors, the holders, though resident in France, were bound, the bill having been drawn and indorsed in England, if they desired to fix the parties in this country, to present the bill for payment at the time at which it fell due in the regular course, according to its tenor, and if it was not then paid, to give notice of its dishonour—the right to insist on due diligence in these particulars according to the law of England, as a condition precedent of liability, being one which it was not competent to a foreign legislature to affect. That, at all events, the transaction between the defendants and the plaintiff having occurred in this country, their respective rights and liabilities must be determined by English law. The implied contract of indemnity, which attaches on nonpayment of a bill of exchange, is based, it was urged, on the assumption that the bill will be presented for payment at the time specified by it; and that, in case of nonpayment, notice of dishonour will thereupon be given. How then, it was asked, can the right to insist on these as the conditions of liability on a bill drawn and indorsed in this country be modified or affected by the legislation of a foreign country?

The question is of considerable importance and interest in a juridical point of view. It has occupied the attention of the tribunals in Germany, Switzerland, and Italy. The High Court of Leipzig has decided it in favour of the view presented to us on the part of the defendants. The High Court of Geneva and the Cour de Cassation of Turin have come to the opposite conclusion. Our view coincides with theirs.

In considering the subject, two questions present themselves. The first, as to what was the effect of this special legislation on the obligations of the acceptors; the second, as to what, if any, was its effect on the rights and liabilities of the drawers and indorsees inter se. It is with the second question that we are more immediately concerned; but the consideration of the first may materially assist us towards the satisfactory solution of the second.

Now that, so far as the French law was concerned, the effect of the exceptional legislation in question was to substitute, as the time of payment, the expiration of the period of grace afforded by it for the time specified in the bill, and to suspend till then the legal obligation of the

[66] Part of the opinion is omitted.

acceptors to pay, cannot be doubted. If the bill had been presented for payment on the 5th of October, and payment having been refused, an action had been brought in a French court against the acceptors, whether by a French or foreign holder, the plaintiff must by the effect of the new law have been defeated. Even if the acceptors had been found in this country, and an action had been brought against them in an English court, the result must have been the same. It is well settled that the incidents of presentment and payment must be regulated and determined by the law of the place of performance—a rule which is strikingly illustrated by the familiar but pertinent example of the effect of days of grace being allowed by the law of the country where a bill of exchange is drawn, but not by the law of the country where it is payable, or vice versa, the payment of the bill being, as is well known, deferred till the expiration of the days of grace in the one case, but not so in the other. And this arises out of the nature of the thing, as the acceptor cannot be made liable under any law but his own. It is, indeed, true that, in the present instance, the period of grace has been accorded by ex post facto legislation. But this appears to us to make no difference in the result, at all events so far as the obligations of the acceptors are concerned. The power of a legislature to interfere with and modify vested and existing rights cannot be questioned, although no doubt such interference, except under most exceptional circumstances, would be contrary to the principles of sound and just legislation.

Such being the effect of this legislation on the liability of the acceptor, we have next to consider its effect on the relative position of the drawer and the drawee or indorsee and holder. It is said that, although the obligations of the acceptor may be determined by the lex loci of the country in which the bill is payable, the contract as between the drawer and indorsee must be construed according to the law of the country where the bill was drawn; and, consequently, that in order to make the defendants, the drawers of this bill, liable, the bill should have been presented at the time specified in it, and on nonpayment notice of dishonour should thereupon have been given according to the requirements of English law. It is unnecessary to consider how far this position may hold good as to matter of form, or stamp objections, or illegality of consideration, or the like. We cannot concur in it as applicable to the substance of the contract, so far as presentment for payment is concerned; still less to a formality required on nonpayment in order to enable the holder to have recourse to an antecedent party to the bill. Applied to these incidents of the contract, this reasoning appears to us altogether to overlook the true nature of the contract which a party transferring for value the property in a bill of exchange makes with the transferee. All that he does is to warrant that the bill shall be accepted by the drawee, and, having been accepted, shall, on being presented at the time it becomes due, be paid. In other words, he engages as surety for the due performance by the acceptor of the obligations which the latter

takes on himself by the acceptance. His liability, therefore, is to be measured by that of the acceptor, whose surety he is; and as the obligations of the acceptor are to be determined by the lex loci of performance, so also must be those of the surety. To hold otherwise would obviously lead to very startling anomalies. The holder might sue the drawer or indorser before, according to the law applicable to the acceptor, the bill became due; or, the acceptor having refused payment till the expiration of the period of grace thus afforded him by the new law, but on presentment at the end of that time having duly paid, the holder might claim compensation against the indorser in respect of any loss he might have sustained by reason of the delay, although the obligations of the acceptor had been fully satisfied by the payment of the bill. Again, as a bill may be indorsed in different countries before it arrives at maturity, and each indorsement becomes a fresh undertaking with the subsequent parties to the bill for due performance by the acceptor, unless the performance to which the acceptor is bound is made the measure and the limit of each indorser's liability, confusion must arise in determining by what law the rights and liabilities of the different indorsers and indorsees inter se shall be governed.

It may be urged, no doubt, that, though it may be true that the parties to a bill of exchange, payable in a foreign country, may be assumed to have contracted for the payment of the bill according to the existing law of the country in which it is to be paid, they cannot be assumed to have contracted on the supposition of that law being altered in the interval prior to the bill becoming due; that, on the contrary, the intention of the parties was that the bill should be paid according to the existing law, and the undertaking of the party transferring it was that it should be so paid; and that such being the effect of the indorsement, the obligation of the indorser cannot, as between him and his indorsee, be affected by ex post facto legislation in the foreign country. A strong argument ab inconvenienti may also be founded on the serious consequences which may ensue to the holder of a bill of exchange, if the time of payment, as fixed by the bill, may be postponed by subsequent legislation. He may require the money secured by the bill at the precise moment it is to become due; he may have purchased the bill for the purpose of insuring the command of it. The delay in receiving it may involve him in the greatest embarrassment. The indorser ought, therefore, to be held strictly to his undertaking that the bill shall be met at the time stated in it, and contemplated by the parties as the date of payment. That to hold otherwise would be materially to shake the credit and impair the utility of negotiable instruments.

To the first of these arguments it may be answered, that the indorser of a bill guarantees its payment only according to the effect of the bill at the place of payment. He transfers all the right the acceptance gives him against the acceptor, and guarantees that the obligations of the latter, as arising from the acceptance, shall be fulfilled. If, by an altera-

tion of the local law pending the currency of the bill, the obligations of the acceptor are rendered more onerous, those of the indorser become so likewise. Thus, if it were enacted that certain days should be treated as holidays, and that a bill falling due on any one of them should be paid at an earlier date, the indorser, on nonpayment of the bill at such earlier date, would become liable from such date. On the other hand, if the time of payment were postponed by a period of grace being allowed, or by an enactment that a bill, falling due on a day appointed to be kept as a holiday, should be payable a day after, as was done by St. 34 & 35 Vict. c. 17, the period at which the liability of the indorser on nonpayment by the acceptor would arise, would be pro tanto delayed.

To the second argument it may be answered, that it goes rather to the expediency of such exceptional legislation than to its effect. Further, that the instances in which it is resorted to are so extremely rare as to be little likely to have the effect of lessening the faith in negotiable instruments or diminishing their utility.

If, then, the right of the holder, as against the acceptor and the antecedent parties, can be thus modified in respect of the time of payment, there can be no injustice or hardship towards them in holding him exempted from the obligations of presenting the bill earlier than his right of payment accrues, or of giving notice of dishonour in order to preserve his right of recourse to them.

If the time of payment, which is of the essence of the contract, and the consequent necessity for presentment at the original time can thus be postponed, it would seem to follow that, a fortiori, a formality, the necessity for which arises only on the nonfulfillment of his obligation, by the acceptor, would follow any alteration introduced by the law in respect of the time at which that obligation was to be discharged. But, independently of this consideration, we are of opinion, on general principles, that notice of dishonour cannot be required until payment has been legally demandable of the acceptor, and has been refused. It is true that if the bill had been presented for payment at the time mentioned in it, the acceptors might, possibly, have omitted to avail themselves of the indulgence accorded by the special law, and might have paid at once. But so might, possibly, the acceptor of a bill under ordinary circumstances, if asked to do so as matter of grace or of special arrangement. The holder of a bill of exchange cannot be held bound to present it for payment till it becomes legally payable, that is to say, payable as matter of right and not of option. Neither, therefore, can he be called upon to give notice of nonpayment to the indorser before the time when his right to demand payment of the acceptor has accrued, and the liability of the indorser, consequent on such refusal, has arisen. There cannot be two different times at which a bill of exchange becomes payable. Suppose the holder had presented this bill for payment at the time specified in it, and payment had been refused by reason of the extension of time afforded by the new law, such presentment would certainly not have dispensed with the necessity of presenting the bill

anew, when the period of grace expired, and the liability of the acceptors had arisen; and the omission to present it then would have had the effect of discharging the indorser. If presentment at the expiration of the time allowed by the special law was necessary to fix the legal liability of the acceptor and the indorser, it was only on such presentment and nonpayment thereupon that the bill could be treated as dishonoured, or that notice of its dishonour could be effectually given so as to charge the indorser.

Another ground for holding that presentment and notice of dishonour at the earlier period were not necessary to preserve the right of recourse against the defendants, as drawers and indorsers, is to be found in the reasons assigned for requiring presentment at the appointed time and notice of dishonour immediately on payment being refused. The reason given is, that the drawer, whom it is intended to make liable, may have the earliest opportunity of withdrawing his assets from the acceptor, or resorting to such other remedies against him as the law may afford. But in such a case as the present, as the acceptor remains bound to the holder to pay the bill when presented at the time it becomes legally due, the drawer could not withdraw from him the means of satisfying that liability, or take steps against him for nonfulfillment of an obligation not as yet capable of being legally enforced.

[The learned Chief Justice here examined Allen v. Kemble, 6 Moo. P. C. 314, Gibbs v. Fremont, 9 Ex. 25, Rothchild v. Currie, 1 Q. B. 43, and Hirschfeld v. Smith, L. R. 1 C. P. 340.]

Judgment for the plaintiff.[67]

[67] Accord: *France*, App. Aix, April 9, 1872 (D. 1872, 2, 202). *Italy*, Cass. Turin, March 6, 1872 (Annali 1872, 1, 107); Cass. Turin, May 20, 1879 (Annali 1879, 1, 405); Cass. Florence, Jan. 16, 1873 (Annali 1873, 1, 47), and note; App. Rome, June 12, 1872 (Annali 1872, 2, 266). Contra: *Germany*, 1 R. O. H. G. 288 (Feb. 21, 1871), notwithstanding the general rule that the time and mode of presentment, protest, and notice are governed with respect to all parties by the law of the place of performance (article 86, Bills of Exchange Act), and the day of maturity is determined by the law of the place of payment. R. G. Dec. 11, 1895 (6 Niemeyer, 429). *Italy*, App. Milan, April 16, 1872 (Annali 1872, 2, 139).

For a review of the literature on this question, see 17 Goldschmidt's Zeitschrift für das gesamte Handelsrecht, 294–309; 18 Id. 625–643.

American and English Law.—The law of the place of payment will determine whether or not it is entitled to days of grace. Cribbs v. Adams, 13 Gray (Mass.) 597 (1859); Bowen v. Newell, 13 N. Y. 290, 64 Am. Dec. 550 (1855); Pawcatuck Nat. Bank v. Barber, 22 R. I. 73, 46 Atl. 1095 (1900). And the time, manner and sufficiency of the demand and protest. Pierce v. Indseth, 106 U. S. 546, 1 Sup. Ct. 418, 27 L. Ed. 254 (1883); Carter v. Union Bank, 7 Humph. (Tenn.) 548, 46 Am. Dec. 89 (1847); Commercial Bank of Kentucky v. Barksdale, 36 Mo. 563 (1865); Sylvester v. Crohan, 138 N. Y. 494, 34 N. E. 273 (1893); Douglas v. Bank of Commerce, 97 Tenn. 133, 36 S. W. 874 (1896). Contra: Musson v. Lake, 4 How. (U. S.) 262, 11 L. Ed. 967 (1846).

Whether or not the acceptance of a bill or note operates as payment of the original indebtedness has been held to depend upon the law applicable to the original obligation. Tarbox v. Childs, 165 Mass. 408, 43 N. E. 124 (1896). But see Minor, Conflict of Laws, § 189.

The English Bills of Exchange Act provides as follows:

Sec. 72. Where a bill drawn in one country is negotiated, accepted, or pay-

able in another, the rights, duties, and liabilities of the parties thereto are determined as follows:

(1) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance supra protest, is determined by the law of the place where such contract was made.

Provided that—

(a) Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue.

(b) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom.

(2) Subject to the provisions of this act, the interpretation of the drawing, indorsement, acceptance, or acceptance supra protest of a bill, is determined by the law of the place where such contract is made.

Provided that where an inland bill is indorsed in a foreign country the indorsement shall as regards the payer be interpreted according to the law of the United Kingdom.

(3) The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, ~~or otherwise,~~ are determined by the law of the place where the act is done ~~or the bill~~ is dishonoured.

~~(4)~~ Where a bill is ~~drawn out of~~ but payable in the United Kingdom and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.

(5) Where ~~a bill is drawn in~~ one country and is payable in another, the due date ~~thereof is determined~~ according to the law of the place where it is payable.

CONTINENTAL LAW.—The contracts of the drawer and indorser are subject to the law of the place where such contracts are respectively made. *France*, Cass. Feb. 6, 1900 (S. 1900, 1, 161), and note. *Germany*, 44 R. G. 153 (Oct. 4, 1889); 9 R. G. 431 (March 28, 1883). Unless a different intention of the parties is apparent. 24 R. G. 112 (Nov. 5, 1889). *Italy*, Cass. Florence, April 8, 1895 (S. 1896, 4, 7); Cass. Florence, Jan. 16, 1888 (15 Clunet, 735). When the parties are subjects of the same country, however, they will be deemed to have contracted with reference to their national law. Article 9, Prel. Disp. Civ. Code; Cass. Naples, Jan. 4, 1898 (La Legge 1898, 1, 617).

The law applicable to each contract governs the necessity of presentment, protest, and notice. *Germany*, 19 R. O. H. G. 203 (Feb. 1, 1876); 24 R. G. 112 (Nov. 5, 1889). *France*, see Weiss, Traité de droit international privé, IV, 442–444. *Italy*, App. Messina, March 15, 1891 (Foro It. 1891, 1, col. 574).

The time and mode of presentment, protest, and notice, on the other hand, are governed by the law of place of payment of the bill or note. *France*, Cass. July 5, 1843 (S. 1844, 1, 49); App. Chambéry, Nov. 25, 1864 (S. 1865, 2, 96); App. Paris, March 22, 1875 (3 Clunet, 361). *Germany*, article 86, Bills of Exchange Act. *Italy*, article 58, Com. Code; Cass. Turin, May 6, 1883 (Giurispr. Tor. 1883, p. 446). See App. Milan, June 5, 1895 (25 Clunet, 595).

See, also, Ch. Brocher, Étude sur la lettre de change dans ses rapports avec le droit international privé, 6 Revue de Droit International, 5–56, 196–229; F. P. Contuzzi, Die internationalen Wirkungen des Wechsels in Ansehung des italienischen Rechts und der italienischen Jurisprudenz, 1 Niemeyer, 572–582; P. Esperson, Diritto cambiale internazionale, Florence, 1870.

(D) Carriers.

CURTIS v. DELAWARE, L. & W. R. CO.

(Court of Appeals of New York, 1878. 74 N. Y. 116, 30 Am. Rep. 271.)

See ante, p. 350, for a report of the case.

MERRITT CREAMERY CO. v. ATCHISON, T. & S. F. R. CO.

(Kansas City Court of Appeals, 1908. 128 Mo. App. 420, 107 S. W. 462.)

JOHNSON, J. This suit was brought by a shipper against a common carrier to recover the value of a shipment of goods lost in transit. A jury being waived by agreement of parties, the court found in favor of defendant on the pleadings and admitted facts, and plaintiff brought the case here by appeal.

The cause of action pleaded in the petition is "that on or about the 26th day of May, 1903, the plaintiff delivered to the defendant for transportation from Great Bend, Kan., to Boston, Mass., and defendant accepted and undertook to transport 25 tubs of butter containing 50 pounds each, 25 tubs of butter containing 30 pounds each, and 26 tubs of butter containing 20 pounds each, consigned to Lamson & Co., Boston, all of which belonged to the plaintiff; that the butter was delivered to plaintiff for shipment in car M. D. T. 9043; that it thereupon became and was the duty of defendant as a common carrier to safely transport and deliver said butter and all of it to consignee at Boston, Mass., yet said defendant, wrongfully neglecting and refusing to perform its duty in that behalf, did fail, neglect, and refuse to so transport and deliver said butter or any part thereof; that said butter was of the value of $529, and that plaintiff has been damaged by said failure to so transport and deliver said butter in the sum of $529." In the answer, defendant admitted that as a common carrier it received the butter from plaintiff for transportation to the consignee at Boston, and that it failed to make delivery. Two defenses are interposed: First. "That, when the cars in which said butter was being carried arrived at Argentine, in the state of Kansas, the same were overtaken by an extraordinary and unprecedented flood of water, wholly beyond the control of this defendant, which inundated and overspread the entire surrounding country, including the tracks and yards of this defendant, and that flood, which was an act of God, entirely destroyed said consignment of butter on May 31, 1903." Second. A statute of Kansas is pleaded which provides that an action of this character shall be barred in three years after the cause of action has accrued, and it is alleged, in substance, that this statute should be applied to defeat a recovery by plaintiff, since the present suit was not

brought until after three years had elapsed from the loss of the property. The following admissions were made by the parties at the trial: "That ever since 1901 there was in full force and effect in the state of Kansas section 4446 of the General Statutes of Kansas, as set out in defendant's amended answer; * * * that the shipments referred to in the plaintiff's petition were delivered to the defendant by the plaintiff at Great Bend, Kan., for shipment to Boston in May, 1903; that said defendant carried said consignments over its road from Great Bend, Kan., to Olathe, Kan., and at said point, in order to avoid the high waters on its road, detoured said consignments and transported them over the 'Frisco Line' to Kansas City, Mo., and from Kansas City, Mo., into its yards on its own line at Argentine, Kan., which was the destination of the train in which this car was, which yards are used by the defendant company for placing all cars preparatory to their being made up into trains; that the goods were not stopped at Kansas City at all, but passed through to Argentine, Kan., from which point they were to have been forwarded to the place of destination, but were never delivered to the consignee. It is further admitted by both parties that, if the defendant in any way failed to perform any duty which defendant owed to the plaintiff, such failure only occurred at Argentine, Kan., on the 31st day of May, 1903." Defendant then moved for judgment on the pleadings and admissions. The motion was sustained, and judgment entered for defendant.

For the purposes of the motion for judgment, defendant, in effect, eliminated the defense pleaded in the answer, that the property was destroyed by the act of God, and relied for defense on the sole proposition that the cause of action accrued at Argentine, Kan., and was barred by the statute of limitations of that state, which under the provisions of section 4280, Rev. St. 1899 [Ann. St. 1906, p. 2355], must be applied in the courts of this state. In this posture of the case, we must assume as established the facts that defendant as a common carrier accepted the shipment at Great Bend, Kan., for delivery at Boston, that it failed to deliver, and that such failure was the result of the loss of the property at Argentine by some tortious act or neglect of defendant. In other words, the motion necessarily is based on the hypothesis that plaintiff is entitled to recover in this action, but for the bar thereto interposed by the Kansas statute. It will be observed that the petition is carefully drawn to plead a cause of action ex delicto as distinguished from one in the nature of assumpsit founded on a breach of the contract of transportation. The cause of action alleged is the failure of defendant to discharge its common-law obligation to deliver the property at its destination. Plaintiff takes the position that the breach of duty occurred at the place of delivery, and consequently that the cause accrued at that place, and that the cause of the failure to deliver (such as an act of God or the public enemy) is immaterial as long as it is not shown to be one which would excuse

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the carrier from liability under the common law. On the other hand, defendant argues that the act of the carrier which disabled it from discharging its common-law duty to deliver is the real cause of action, and that the fact that the property was not delivered is but evidentiary, and in no sense creative of the cause of action. We are of opinion that plaintiff has the better of the argument and that the learned trial judge erred in sustaining the motion for judgment. At common law the obligation of a common carrier with respect to the subject of transportation is that of an insurer. It is liable for loss of or damages to the property regardless of the nature of the cause of injury. To this rule there are certain exceptions. If the carrier can show that the proximate cause of its apparent breach of duty was some overwhelming force such as the act of God or the public enemy, or that it resulted from unavoidable accident, from the fraud or fault of the owner of the goods, or from some inherent defect or infirmity of the goods themselves, which has caused the injury, it will be relieved of its obligation of an insurer, and will not be held to respond in damages for the loss or injury sustained. In the absence of proof of such excusing fact, the burden of which is on the carrier, the fact of failure to deliver of itself constitutes a cause of action, and the plaintiff neither in his pleading nor evidence is required to go behind that fact to show the specific misconduct that incapacitated the carrier from delivering the goods. The owner of goods lost in transportation by a cause which will not relieve the carrier from liability may have several different causes of action, any one of which he may elect to prosecute. He may sue, as we have said, in tort for breach of the common-law duty to deliver, or for breach of the contract of transportation, or by treating the carrier as a mere bailee, may allege the specific tortious act by which the goods were lost and found his right to recover on that. The place where the goods were to be delivered is the place where the cause originates in the first-mentioned class of actions, but the place where the tortious act occurred is that where the cause arises which is based on the specific misconduct that produced the injury. The cause pleaded in the present action being for breach of the common-law duty to deliver the goods in Boston, the statute of limitations in force in Massachusetts (under the provisions of section 4280, Rev. St. 1899 [Ann. St. 1906, p. 2355]) controls the time in which that action may be prosecuted in this state, and the learned trial judge erred in holding that the Kansas statute should be applied. There is nothing in the case of Lamar Mfg. Co. v. St. Louis & S. F. R. Co., 117 Mo. App. 453, 93 S. W. 851, at variance with what we have said. It is true that, when the carrier sustains the burden of showing that the loss or injury to the goods was the direct result of an act of God, the burden of proving that the carrier, notwithstanding the presence of such excusing cause was guilty of concurring negligence which directly contributed to the loss or injury, is on the plaintiff; but that rule goes only to a matter of defense, and cannot operate

to change either the nature or the situs of the cause of action. With the defensive matter met by proof of concurring negligence, the cause still rests on the failure of the carrier to deliver the goods at their destination.

But it is argued by defendant that the admission made by plaintiff "that, if the defendant in any way failed to perform any duty which defendant owed to the plaintiff, such failure only occurred at Argentine, Kansas, on the 31st day of May, 1903," made the tort, if any, which occurred at that place the ground of his action. We do not agree with this contention. Construed in the light of the pleadings and of the other facts admitted, we think it was not within the contemplation of the parties to attempt to change the cause pleaded in the petition, and that the parties meant only to agree that, if the goods were lost through the misconduct of defendant, such misconduct occurred at Argentine. Whether the fact of the place where the goods were lost was admitted by the parties or was made a matter of proof, it would be immaterial to the cause pleaded in the petition, and, in any event, could be only material to prove or disprove the defensive issue that the goods were destroyed by an act of God or by some other cause that would excuse the carrier from its common-law liability.

It follows from what has been said that the judgment must be reversed, and the cause remanded. All concur.

In re MISSOURI S. S. CO.

(Court of Appeal, 1889. 42 Ch. D. 321.)

See ante, p. 352, for a report of the case.

GRAND v. LIVINGSTON.

(Supreme Court of New York, Appellate Division, 1896. 4 App. Div. 589, 38 N. Y. Supp. 490.)

See ante, p. 367, for a report of the case.

PITTSBURGH, C., C. & ST. L. RY. CO. v. SHEPPARD.

(Supreme Court of Ohio, 1897. 56 Ohio St. 68, 46 N. E. 61, 60 Am. St. Rep. 732.)

Action by Harry D. Sheppard against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. Sheppard delivered to the Terre Haute & Indianapolis Railroad, at Lovington, in the state of Illinois, a car load of horses which that company agreed to transport

over its line to Indianapolis, Ind., and there deliver them to plaintiff in error for carriage to the city of Columbus, Ohio. The contract with the former company is in writing, and contains a stipulation that, "in case of any loss or damage, the liability of said company and of any connecting line shall not exceed $100 per head." The horses were safely delivered to the plaintiff in error, at Indianapolis, and received by it in good condition; but, while being transported over its line in this state, a defective wheel of one of the cars in the train gave way, in consequence of which one of the horses was killed, and the others were injured. Sheppard brought suit in the court of common pleas of Franklin county against the plaintiff in error for damages, alleging that his loss was occasioned by the company's negligence. The company denied negligence on its part, and pleaded the stipulation in the contract, above set forth, as a limitation on its liability, averring that the contract was made in the state of Illinois, where, under the law of that state, such stipulation is valid. Issue was joined on the allegations of the answer, and on the trial evidence was given by both sides tending to prove what the law of Illinois on the subject was when the contract was made. The plaintiff recovered more than the amount limited by the contract, and that judgment was affirmed by the circuit court. The railway company prosecutes error here to obtain the reversal of both judgments.

WILLIAMS, C. J.[68] It is not contended there is sufficient ground for disturbing the judgments below, for lack of evidence tending to prove that the negligence charged against the defendant was the cause of the plaintiff's loss; but it is claimed the evidence did not establish gross or willful negligence, and that under the law of Illinois, where the contract for the transportation of the horses was made, it was competent for a common carrier of goods to limit his liability, by special agreement, except as against his negligence of that character. And the principal contention of counsel for the plaintiff in error is that the trial court erred in its charge concerning the law of Illinois on that subject; the complaint being that the charge, in substance, was a statement of the rule established in this state, instead of that which obtains in Illinois. The parties put in evidence several decisions of the Supreme Court of that state to prove the law of the state, and counsel in argument seek to maintain different interpretations of those decisions favorable to their respective clients. But if the rights of the parties are to be determined by the laws of this state, and not by those of Illinois, the charge was not erroneous or prejudicial, though given as the law of that state. There is nothing to show that any traffic arrangement existed between the two railroad companies, nor any agency or authority of one to contract for the other; and assuming that the plaintiff in error, by accepting the horses from the other

[68] A part of the opinion not relating to the Conflict of Laws has been omitted.

company, and undertaking to transport them over its line, became a party to the contract with the plaintiff below, it did so at Indianapolis, and its contract was to carry the horses from that point to their destination. No part of its performance of the contract was to take place in the state of Illinois; and, if the carriage of the property over that part of its road which is located in Indiana could be considered as a performance having the effect of making the rights of the parties under the contract subject to the laws of that state, none differing from those of this state was pleaded or proven, and there is no presumption that they were different.

But, if the law of Indiana were shown to be the same as that of Illinois is claimed to be, it would not be the law governing this contract. We understand the rule to be that where a contract is made in one state, to be performed in part in another, and an action is brought for a breach of that part of the contract, the rights of the parties must be determined according to the law of the latter state. Story, Cont. § 655; Barter v. Wheeler, 49 N. H. 9, 6 Am. Rep. 434. It is apparent, however, from the face of this contract that it was to be wholly performed in this state. The property was to be transported to Columbus, where the consignee was entitled to receive it from the carrier. The latter was bound to deliver it at that place. The contract could be performed by the company nowhere else. Carrying the property through a portion of the state of Indiana did not constitute performance. That was merely a means of enabling the company to perform by delivery of the property at its destination. And, the contract being silent as to the time and place of payment of the freight, it was payable at the time of the delivery of the property to the consignee, and necessarily at the place of delivery; so that the place of performance by both parties to the contract was in this state. And the rule is that, when it appears from a contract made in one state or country that it is to be performed in another, the presumption is that it was entered into with reference to the laws of the latter, and those laws determine its validity, obligation, and effect. Kanaga v. Taylor, 7 Ohio St. 142, 70 Am. Dec. 62. Other cases on this subject are largely collected in the briefs of counsel. It is also the well-settled law of this state that a common carrier cannot by special agreement relieve himself from the consequences of his own negligence, nor limit his liability for losses resulting therefrom. This rule is laid down in Welsh v. Pittsburg, Ft. W. & C. R. Co., 10 Ohio St. 65, 75 Am. Dec. 490, as follows: "A railroad company, acting as a common carrier of live stock, cannot, by special contract, procure exemption from responsibility for losses arising from its own neglect of the duties incident to such employment. Such common carrier is liable for damage resulting from defective and unsafe cars or vehicles of transportation, notwithstanding an express contract to the contrary." And see Davidson v. Graham, 2 Ohio St. 132; Graham v. Davis, 4 Ohio St. 362, 62 Am. Dec. 285; Cleveland, P. & A. R. Co. v. Curran, 19

Ohio St. 3, 2 Am. Rep. 362; Cincinnati, H. & D. & D. & M. R. Co. v. Pontius, 19 Ohio St. 221, 2 Am. Rep. 391; Knowlton v. Erie Ry. Co., 19 Ohio St. 263, 2 Am. Rep. 395; United States Express Co. v. Backman, 28 Ohio St. 144; Express Co. v. Schwab, 53 Ohio St. 659, 44 N. E. 1135.

We find no error in the charge of the court that could operate to the prejudice of the defendant below. * * *[69]

DYKE v. ERIE RY. CO.

(Court of Appeals of New York, 1871. 45 N. Y. 113, 6 Am. Rep. 43.)

See post, p. 480, for a report of the case.

HUGHES v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania, 1902. 202 Pa. 222, 51 Atl. 990, 63 L. R. A. 513, 97 Am. St. Rep. 713.)

POTTER, J. The plaintiffs in this case were the owners of a valuable horse, which was shipped by their agent from Albany, N. Y., to Cynwyd, Pa. The contract for transportation was made in Albany with the New York Central Railroad, acting for itself and connecting carriers. The bill of lading provided that "no carrier shall be liable for loss or damage not occurring on its own road, or its portion of the through route." The horse was carried safely by the initial carrier to the end of its line, and delivered to the defendant company, by whom it was brought to Philadelphia. At this point the horse was badly injured by the negligence of defendant's servants, and the injuries thus received are the foundation of this action. The defendant admitted liability, but claimed that the plaintiff was not entitled to recover in excess of $100. In support of this claim, it relied upon a printed form of a shipping contract, which was signed by plaintiff's agent at the time of shipment, and retained by the carrier. This contract contained a stipulation that the liability of the initial carrier and any connecting carrier should be limited, in case of loss or damage to a horse or mule, whether through negligence or otherwise, to an amount not exceeding

[69] It is held in a number of jurisdictions that, since a contract of carriage through several states is to be in part performed in the state where the contract is made, the law of such state should govern. McDaniel v. Chicago & N. W. R. Co., 24 Iowa, 412 (1868); Illinois Cent. R. Co. v. Beebe, 174 Ill. 13, 50 N. E. 1019, 43 L. R. A. 210, 66 Am. St. Rep. 253 (1898); Brockway v. American Express Co., 171 Mass. 158, 50 N. E. 626 (1898).

The same principle has been applied to other contracts partially to be performed in the state where made and partially in other states. Morgan v. New Orleans, M. & T. R. Co., 2 Woods (U. S.) 244, Fed. Cas. No. 9,804 (1876); Bartlett v. Collins, 109 Wis. 477, 85 N. W. 703, 83 Am. St. Rep. 928 (1901).

$100 each. At the trial the court below declined to charge the jury that such a limitation of the amount of the damages was lawful in this case. The jury, under the evidence, found a verdict for $9,900—the full value of the horse.

The refusal of the court to charge that the contract of shipment, limiting the liability for negligence, was valid and binding upon the plaintiff, is here assigned as error. It is conceded that this contract is valid under the law of New York, and that, if the horse had been injured while in course of transportation through that state, the plaintiffs would have been limited to the sum of $100. It is also conceded that such a contract, made in Pennsylvania, for transportation between points within the state, would be void, as against the settled policy of this state. The question is not an open one with us. Nor does it matter whether the attempt be to limit the liability, as in Ruppel v. Allegheny Valley Ry., 167 Pa. 166, 31 Atl. 478, 46 Am. St. Rep. 666, or to claim exemption entirely from liability, as in Willock v. Pennsylvania R. Co., 166 Pa. 184, 30 Atl. 948, 27 L. R. A. 228, 45 Am. St. Rep. 674. But because the contract was made in New York, to be performed partly in New York and partly in Pennsylvania, it is contended that the law of New York should govern the case. It may be noted here that while the contract contains an acknowledgment that Grady had the option to ship the horse at a higher rate, with increased liability, yet, as a matter of fact, no such offer was made. The evidence shows that the freight agent at Albany did not know the amount of the charges, and the blanks for the amounts were not filled in. The case of Burnett v. Pennsylvania R. Co., 176 Pa. 45, 34 Atl. 972, seems to be decisive of the question now before us. In that case the plaintiff was an employé of defendant at Trenton, N. J. He applied for and obtained free transportation from Trenton to Elmira, N. Y. He received two passes—one, from Trenton to Philadelphia, which was not in evidence, and the other, an employé's trip pass, from Philadelphia to Elmira—by the terms of which he assumed all risks of accident. He was injured at Harrisburg, Pa., through the admitted negligence of the defendant's employés. It was proved at the trial that under the laws of New Jersey the contract by which the plaintiff, in consideration of free transportation, assumed the risk of accident, was valid, and that in that state he could not recover; and it was conceded by the defendant that in Pennsylvania the decisions are otherwise, and that such a contract will not relieve a common carrier from responsibility for negligence. There, as in this case, the contract was valid in the state where made. The transportation was safely performed into this state, and the injury occurred within this state through the negligence of the carrier. It was held that the responsibility of the defendant was to be determined by the law of the state where the contract was being performed, and where the negligence occurred, and recovery was allowed. In the present case the facts are more strongly against the defendant, in that it is not the initial carrier under the contract, and the stipulation upon the part of

each carrier was against liability for damages not occurring on its portion of the through route. In Fairchild v. Philadelphia, W. & B. R. Co., 148 Pa. 527, 24 Atl. 79, there was a contract for the transportation of a horse from Washington, D. C., through Pennsylvania, to Harkimus, N. J. It was injured by the negligence of the defendant while in Baltimore, Md. The contract contained a stipulation limiting the value of the horse to $100. Suit was brought to recover damages for the injury. The court below held the contract to be valid, and, under instructions, a verdict was rendered for $105.50, and judgment entered thereon. This judgment was affirmed; this court saying, in a per curiam, "This written contract was made in the District of Columbia, and is to be interpreted by the lex loci contractus." Forepaugh v. Delaware, L. & W. R. Co., 128 Pa. 217, 18 Atl. 503, 5 L. R. A. 508, 15 Am. St. Rep. 672. If, however, in the performance of the contract, the horse had been carried into Pennsylvania, and it had been injured in this state, the principle set forth in Burnett v. Railroad Co., supra, would, no doubt, have been applied, and the limitation of liability held void. In the Fairchild Case nothing is said about the law of Maryland, where the injury occurred, though, as a matter of fact, the limitation of liability was valid in that state, as appears in Brehme v. Dinsmore, 25 Md. 328. The Fairchild Case, when properly understood, is authority only for the proposition that a contract containing a limitation of liability, made in a state where it is valid, will be enforced in this state, where an injury occurs in the course of transportation through a state where such a contract is not contrary to public policy. It is only an application of the doctrine of Forepaugh v. Delaware, L. & W. R. Co., 128 Pa. 217, 18 Atl. 503, 5 L. R. A. 508, 15 Am. St. Rep. 672, to a slightly differing state of facts The reference to Hart v. Pennsylvania R. Co., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717, could only have been to show the law of the District of Columbia; for in Grogan v. Adams Express Co., 114 Pa. 523, 7 Atl. 134, 60 Am. Rep. 360, this court expressly refused to follow the Hart Case.

A distinction may well be made between contracts of a general nature, and those of common carriers of goods through several states. Much stress is laid in the brief of appellants upon the opinion of Justice Bradley in Morgan v. New Orleans, M. & T. R. Co., 2 Woods (U. S.) 244, Fed. Cas. No. 9,804. The contract in that case was made in New York, to be performed, in an important part, there, and in part by the building of a railroad in Louisiana. Another important part was to be performed in Alabama, and perhaps other important parts in other states. The court held that, where a contract is to be performed in several jurisdictions, there could be no presumption that the parties had in view the laws of each of these jurisdictions, as the law that was to govern the contract, and therefore held that it was governed by the law of New York, where it was made. But it will be noticed that the case did not involve the law of common carriers, but only a contract relating to a matter about which the parties were free to contract, and against

which there was no public policy of any state. The inquiry was therefore properly confined to ascertaining the intention of the parties to the agreement. But a contract for the carriage of goods is not one as to which parties are entirely free to contract. Judge Sulzberger, in his charge in this case, aptly said: "There are, however, limitations upon the right of contract. There is a certain field of human activity over which the state assumes supreme control by virtue of its sovereignty, and when the state declares its policy, which we call 'public policy,' upon these questions, then the right of private contract is utterly abolished to that extent." It will not do, therefore, to apply to the contracts of common carriers all the principles that may apply to other contracts. When courts declare a contract void as against public policy, they are not declaring the intention of the parties, as in the ordinary case, but are acting under the obligation of the higher law, which requires the enforcement of that which is for the public good. Where a contract containing a stipulation limiting liability for negligence is made in one state, but with a view to its performance by transportation through or into one or more other states, we see no reason why it should not be construed in accordance with the law of the state where its negligent breach, causing injury, occurs. If such a contract comes under construction in a state like Pennsylvania, whose policy prohibits such exemption, and the injury has occurred in a state where the contract is valid, the stipulation will be enforced, as in Forepaugh v. Railroad Co. and in Fairchild v. Railroad Co. But if the injury has taken place within its limits, it will declare the contract null and void, as in Burnett v. Railroad Co. In the Fairchild Case, as the injury occurred in Maryland, this court enforced the law of that state. If the injury to the horse had been delayed until in the course of the journey it had reached Pennsylvania, our own law of public policy would have controlled. This principle is maintained in Barter v. Wheeler, 49 N. H. 9, 6 Am. Rep. 434. In that case the transportation was from Toledo, Ohio, to Concord, N. H. The goods were lost on their passage through New York, and the court said that, if it is to "be executed partially in New York, we perceive no reason why, in respect to that part, the law of that state should not govern; and such is the doctrine laid down in Story, Cont. § 655." To the same effect is Pittsburg, C., C. & St. L. R. Co. v. Sheppard, 56 Ohio St. 69, 46 N. E. 61, 60 Am. St. Rep. 732. This principle involves no greater difficulty, as to proof, than the attempt to recover under a limitation of liability. In either case, negligence is a fact to be proven as to time and place, as any other fact.

Careful consideration of the contract and of the evidence shows that the contract in this case was not entire, either as to the obligation of the carrier to transport, or of the shipper to pay the freight. The New York Central Railroad made no contract for itself beyond its own lines. It acted as agent only for the connecting carrier. It is the same as though each carrier had separately agreed to transport over its own line. And the freight charges were shown to be made up of two dis-

tinct sums; one being the amount from Albany to Jersey City, and the other from Jersey City to Cynwyd. No case has come under notice, directly deciding that such a contract is severable. But in Wells v. Thomas, 27 Mo. 17, 72 Am. Dec. 228, the ruling is such as to indicate that, in the opinion of the court, the bill of lading issued in that case, covering lines of several carriers, was not an entire contract.

The third assignment of error suggests that the entry of judgment is in conflict with the interstate commerce act of Congress. This seems to be an afterthought, as there is no indication in the record that this question was raised or considered in the court below. It is not apparent how the act can have any application to this case. It contains nothing bearing upon the validity of a contract limiting the liability of a railroad for loss or injury caused by negligence. The object of the act seems to be to secure continuous carriage and uniform rates, and to compel the furnishing of equal facilities. We cannot see that the entry of judgment in this case interferes in any way with the legitimate exercise of interstate commerce.

Upon the case as a whole, there is nothing to show any bad faith upon the part of the shipper. He applied for the transportation of his horse upon a special car, and loaded him thereon, together with the traps and harness and a special attendant. There was no concealment, nor any misrepresentation as to value. The shipper paid the carrier the amount asked of him. It does not appear that any bargain was made in advance for a freight rate; nor was there any reason why the full rate, sufficient, in the opinion of the carrier, to cover the risk of transportation, should not have been charged and collected. The shipper should not be asked to pay for insurance against the negligence of the employés of the carrier. If protection of that nature was desired, the carrier was at liberty to procure it for itself, and at its own expense. It must be assumed, also, that both shipper and carrier knew the law of Pennsylvania, and had it in view when the contract was made. The facts were submitted to the jury in a charge which clearly and correctly stated the public policy of this state with regard to the question under consideration.

The assignments of error are overruled, and the judgment is affirmed.

MITCHELL and BROWN, JJ., dissent.

WESTERN UNION TELEGRAPH CO. v. LACER.

(Court of Appeals of Kentucky, 1906. 93 S. W. 34, 29 Ky. Law Rep. 379, 5 L. R. A. [N. S.] 751.)

O'REAR, J. A telegram was sent from Booneville, Ind., to appellee, then at Louisville, Ky., on August 19, 1904, as follows: "Jake Lacer, Enterprise Hotel, Louisville, Ky. Napoleon failing, can't live, doctor says. L. Lacer." The Napoleon referred to was appellee's

brother. He was then very ill at Booneville, Ind., and died on August 21, 1904. If the telegram had been delivered promptly, appellee, who was at the Enterprise Hotel in Louisville, could have reached his brother's bedside before his death. But the telegram was not delivered till August 25, 1904, six days after it was sent, and four days after the death of appellee's brother referred to therein. It is admitted that appellant had not a direct line of wire from Booneville, Ind., to Louisville, Ky. The message had to be sent to Evansville, Ind., where it was transferred from one of appellant's lines to another, and thence forwarded to Louisville. In taking it off the Booneville line and transferring to the Louisville line, some of appellant's agents misread the name Lacer, and sent it as Koer, so that, when it was delivered to the Enterprise Hotel at Louisville, there being no one there by the name of Jake Koer, it was returned to appellant's receiving office in Louisville where it was found by appellee at the date last mentioned above. Appellee brought this suit in the Jefferson circuit court to recover damages for his mental suffering occasioned by appellant's breach of its contract in failing to deliver the message expeditiously, as it had agreed to do.

The action is maintainable under the laws of this state (Chapman v. Western Union Telegraph Co., 90 Ky. 268, 13 S. W. 880; Western Union Telegraph Co. v. Van Cleave, 107 Ky. 464, 54 S. W. 827, 92 Am. St. Rep. 366), unless, as appellant contends it is, the cause of action accrued in Indiana, where such damages are not recoverable, which brings us to an analysis of the cause of action sued on. Appellant is engaged in a service of the public for hire. Its business is that of a common carrier of messages. It contracted with the sender of the dispatch in this case, for the benefit of appellee, that it would promptly and expeditiously deliver the exact message received by it to the person at the place addressed. The relation is one growing out of contract. The breach by appellant gives the sendee of this message the right to recover damages within the legal contemplation of the parties when it was entered into, which, since the Chapman Case, supra, must be deemed to have included mental anguish occasioned by a failure to deliver it. Appellant seeks to avoid the breach of the contract by alleging, so as to avoid the effect of the Kentucky rule on this subject, that the breach occurred by reason of its negligence wholly in the state of Indiana, where the contract was made. The cases of Cleveland, C., C. & St. L. Ry. Co. v. Druien, 118 Ky. 237, 80 S. W. 778, 66 L. R. A. 275, and Adams Express Co. v. Walker, 119 Ky. 121, 83 S. W. 106, 67 L. R. A. 412, are particularly relied on as supporting its position in this contention. Each of these cases arose out of a contract to ship property from another state into the state of Kentucky by a common carrier operating in both the states. In each case it was held that the breach of such a contract made in another state, would give to the shipper or consignee a right of action therefor in the state where the breach occurred, which would be governed by the laws of such lat-

ter state. From this it is argued that, as it is admitted that the negligent act of appellant in this case, by which the dispatch was altered in the name of the addressee and sender, occurred wholly in Indiana, the cause of action therefor arose then in that state, and the rights of the parties growing out of the contract must be controlled by the laws of that state. This contention is, we think, a misconception of the nature of the action in this case. It is for the breach of a contract, caused, it is true, by a tortious act of appellant. A contract made in one state, to be performed partly where made and partly in another state, should be construed, in fixing a liability for its breach, according to the laws of the jurisdiction where the breach occurred; for it must be conclusively presumed that the parties entered into it with such intent, purposing that in its execution, as well as in its construction, the laws of each state where it was being performed were to be read into it. This is the precise point decided in the Druien Case, supra.

But, argues appellant, the performance in this case was in course of execution in Indiana, where the contract was made, when it was breached; i. e., when appellant negligently altered the address so as to cause it to miscarry. The thing contracted for in this case was, not to carry property, but to do a service. The service which was contracted for was to expeditiously deliver the correct message to the addressee at the point addressed. See extended opinion in Howard v. Western Union Telegraph Co., 119 Ky. 625, 86 S. W. 982. Transcribing it into the characters of the Morse code, or otherwise, temporarily rendering it unintelligible to ordinary persons including appellee, would not affect the contract or any rights of the parties, so long as it was finally and in due time correctly communicated to the person intended. The message consisted of intelligence to be transmitted partly by means of electrically conducted sounds, and partly by messenger, so that it would quickly reach the person designated by the contract. Appellant undertook to do this. It was a single undertaking, the performance of which was to take place in Kentucky. The delivery of the message, the communication of the intelligence to the person named, was the thing to be done. The contract in suit is not different in this feature of its nature than if A. undertook to go in person from Booneville, Ind., to Louisville, Ky., and there find B. at a named point, and communicate to him a message for the sender. Whether A. en route forgot the message, or misremembered the name of the person to whom it was to be delivered, would not be material as affecting his liability in the undertaking. If he in fact found the person and told him the true message, the contract would be satisfied. But his failure to deliver would be a breach of his undertaking, which could not occur till he failed to deliver at the place and within the time contracted for. That appellant, a corporation, sends its messages by electric current, instead of personal messengers, does not alter the nature of the service, so far as its being an undertaking to do a single thing. The element of expedition is the principal material

difference between the service undertaken in this case and the one imagined in the illustration. In our opinion it is materially different from the nature of a contract to carry a chattel and deliver it. As was said in the Druien Case, that contract (to carry a lot of horses) "was not only to deliver. It was also to safely carry. It was broken * * * when the horses were killed. A cause of action upon the contract instantly arose. A suit could have been maintained there that moment for its breach." Obviously, if a carrier undertook to carry a lot of horses from a point in Illinois and deliver them to a point in Kentucky, if the horses were killed by the carrier in Illinois, it could never do anything more toward executing its undertaking. The thing it was to carry and deliver no longer had an existence. The chattel consigned to the carrier's safe-keeping had been destroyed by it. Hence the consignee could then say that the undertaking was that moment broken. But in the case at bar the thing to be transmitted was formless, impalpable, a message of words conveying intelligence, a mental picture of a fact, to be reproduced by words uttered. It could not be hurt, much less destroyed, in its transmission. Nothing but the failure to deliver in due time could affect its value to the sendee. There cannot be a segregation of liability on the undertaking. It is whole, single, and susceptible of becoming fixed only in the final act contemplated. A telegraphic message is not property which can be destroyed, though undoubtedly it is susceptible of such interest akin to a property right, that the sender and sendee would be entitled to be protected in its privacy. We are of opinion that appellant's liability on the contract in suit is to be measured by the laws of this state, where the breach of the contract occurred. Such was the ruling of the circuit court.

Judgment affirmed.

LIVERPOOL & G. W. STEAM CO. v. PHENIX INS. CO.

(Supreme Court of the United States, 1889. 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788.)

GRAY, J.[70] This is an appeal by a steamship company from a decree rendered against it upon a libel in admiralty, "in a cause of action arising from breach of contract," brought by an insurance company, claiming to be subrogated to the rights of the owners of goods shipped on board the Montana, one of the appellant's steamships, at New York, to be carried to Liverpool, and lost or damaged by her stranding, because of the negligence of her master and officers, in Holyhead bay, on the coast of Wales, before reaching her destination. In behalf of the appellant, it was contended that the loss was caused by perils of the sea, without any negligence on the part of master

[70] The statement of facts and portions of the opinion have been omitted.

and officers; that the appellant was not a common carrier; that it was exempt from liability by the terms of the bills of lading; and that the libelant had not been subrogated to the rights of the owners of the goods. * * *

The question of negligence is fully and satisfactorily discussed in the opinion of the District Court reported in The Montana, 17 Fed. 377, and in that of the Circuit Court, reported in 22 Blatchf. 372, 22 Fed. 715. It is largely, if not wholly, a question of fact, the decision of which by the Circuit Court cannot be reviewed here; and, so far as it can possibly be held to be or to involve a question of law, it is sufficient to say that the circumstances of the case, as found by the Circuit Court, clearly warrant, if they do not require, a court or jury charged with the duty of determining issues of fact, to find that the stranding was owing to the negligence of the officers of the ship. * * *

We are then brought to the consideration of the principal question in the case, namely, the validity and effect of that clause in each bill of lading by which the appellant undertook to exempt itself from all responsibility for loss or damage by perils of the sea, arising from negligence of the master and crew of the ship. The question appears to us to be substantially determined by the judgment of this court in New York Cent. R. Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627. * * *

It was argued for the appellant that the law of New York, the lex loci contractus, was settled by recent decisions of the Court of Appeals of that state in favor of the right of a carrier of goods or passengers, by land or water, to stipulate for exemption from all liability for his own negligence. Mynard v. Syracuse, B. & N. Y. R. Co., 71 N. Y. 180, 27 Am. Rep. 28; Spinetti v. Atlas S. S. Co., 80 N. Y. 71, 36 Am. Rep. 579. But on this subject, as on any question depending upon mercantile law and not upon local statute or usage, it is well settled that the courts of the United States are not bound by decisions of the courts of the state, but will exercise their own judgment, even when their jurisdiction attaches only by reason of the citizenship of the parties, in an action at law of which the courts of the state have concurrent jurisdiction, and upon a contract made and to be performed within the state. New York Cent. R. Co. v. Lockwood, 17 Wall. 357, 368, 21 L. Ed. 627; Myrick v. Michigan Cent. R. Co., 107 U. S. 102, 1 Sup. Ct. 425, 27 L. Ed. 325; Carpenter v. Providence Washington Ins. Co., 16 Pet. 495, 511, 10 L. Ed. 1044; Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865; Brooklyn City & Newtown R. Co. v. National Bank of the Republic, 102 U. S. 14, 26 L. Ed. 61; Burgess v. Seligman, 107 U. S. 20, 33, 2 Sup. Ct. 10, 27 L. Ed. 359; Smith v. Alabama, 124 U. S. 465, 478, 8 Sup. Ct. 564, 31 L. Ed. 508; Bucher v. Chesire R. Co., 125 U. S. 555, 583, 8 Sup. Ct. 974, 31 L. Ed. 795. The decisions of the state courts certainly cannot be allowed any greater weight in the federal courts when exercising the admiralty and maritime juris-

diction exclusively vested in them by the Constitution of the United States.

It was also argued in behalf of the appellant that the validity and effect of this contract, to be performed principally upon the high seas, should be governed by the general maritime law, and that by that law such stipulations are valid. To this argument there are two answers: First. There is not shown to be any such general maritime law. The industry of the learned counsel for the appellant has collected articles of codes, decisions of courts, and opinions of commentators in France, Italy, Germany, and Holland, tending to show that, by the law administered in those countries, such a stipulation would be valid. But those decisions and opinions do not appear to have been based on general maritime law, but largely, if not wholly, upon provisions or omissions in the codes of the particular country, and it has been said by many jurists that the law of France, at least, was otherwise. See 2 Pard. Droit Com. No. 542; 4 Goujet & Meyer Dict. Droit Com. (2d Ed.) Voiturier, Nos. 1, 81; 2 Troplong Droit Civil, Nos. 894, 910, 942, and other books cited in Peninsular & Oriental Co. v. Shand, 3 Moore, P. C. (N. S.) 272, 278, 285, 286; 25 Laurent Droit Civil Français, No. 532; Mellish, L. J., in Cohen v. Railway Co., L. R. 2 Exch. Div. 253, 257. Second. The general maritime law is in force in this country, or in any other, so far only as it has been adopted by the laws or usages thereof; and no rule of the general maritime law (if any exists) concerning the validity of such a stipulation as that now before us has ever been adopted in the United States or in England, or recognized in the admiralty courts of either. The Lottawanna, 21 Wall. 558, 22 L. Ed. 654; The Scotland, 105 U. S. 24, 29, 33, 26 L. Ed. 1001; The Belgenland, 114 U. S. 355, 369, 5 Sup. Ct. 860, 29 L. Ed. 152; The Harrisburg, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358; The Hamburg, 2 Moore, P. C. (N. S.) 289, 319, Brown. & L. 253, 272; Lloyd v. Guibert, L. R. 1 Q. B. 115, 123, 124, 6 Best & S. 100, 134, 136; The Gætano, L. R. 7 Prob. Div. 137, 143.

It was argued in this court, as it had been below, that as the contract was to be chiefly performed on board of a British vessel, and to be finally completed in Great Britain, and the damage occurred in Great Britain, the case should be determined by the British law, and that by that law the clause exempting the appellant from liability for losses occasioned by the negligence of its servants was valid. * * *

It appears by the cases cited in behalf of the appellant, and is hardly denied by the appellee, that under the existing law of Great Britain, as declared by the latest decisions of her courts, common carriers, by land or sea, except so far as they are controlled by the provisions of the railway and canal traffic act of 1854, are permitted to exempt themselves by express contract from responsibility for losses occasioned by negligence of their servants. The Duero, L. R. 2 Adm. & Ecc. 393; Taubman v. Pacific Co., 26 Law T. (N. S.) 704; Steel v. Steam-Ship Co., L. R. 3 App. Cas. 72; Railway Co. v. Brown, L. R. 8

App. Cas. 703. It may therefore be assumed that the stipulation now in question, though invalid by our law, would be valid according to the law of Great Britain. The general rule as to what law should prevail, in case of a conflict of laws concerning a private contract, was concisely and exactly stated before the declaration of independence by Lord Mansfield (as reported by Sir William Blackstone, who had been of counsel in the case), as follows: "The general rule, established ex comitate et jure gentium, is that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception, where the parties (at the time of making the contract) had a view to a different kingdom." Robinson v. Bland, 1 W. Bl. 234, 256, 258, 2 Burrows, 1077, 1078.

The recent decisions by eminent English judges, cited at the bar, so clearly affirm and so strikingly illustrate the rule, as applied to cases more or less resembling the case before us, that a full statement of them will not be inappropriate.

In Peninsular & Oriental Co. v. Shand, 3 Moore, P. C. (N. S.) 272, 290, Lord Justice Turner, delivering judgment in the Privy Council, reversing a decision of the Supreme Court of Mauritius, said: "The general rule is that the law of the country where a contract is made governs as to the nature, the obligation, and the interpretation of it. The parties to a contract are either the subjects of the power there ruling, or as temporary residents owe it a temporary allegiance. In either case, equally, they must be understood to submit to the law there prevailing, and to agree to its action upon their contract. It is, of course, immaterial that such agreement is not expressed in terms. It is equally an agreement in fact, presumed de jure, and a foreign court interpreting or enforcing it on any contrary rule defeats the intention of the parties, as well as neglects to observe the recognized comity of nations." It was accordingly held that the law of England, and not the French law in force at Mauritius, governed the validity and construction of a contract made in an English port between an English company and an English subject to carry him thence by way of Alexandria and Suez to Mauritius, and containing a stipulation that the company should not be liable for loss of passengers' baggage, which the court in Mauritius had held to be invalid by the French law. 3 Moore, P. C. (N. S.) 278. Lord Justice Turner observed that it was a satisfaction to find that the Court of Cassation in France had pronounced a judgment to the same effect, under precisely similar circumstances, in the case of a French officer taking passage at Hong Kong, an English possession, for Marseilles in France, under a like contract, on a ship of the same company, which was wrecked in the Red Sea, owing to the negligence of her master and crew. Julien v. Peninsular & Oriental Co., imperfectly stated in 3 Moore, P. C. (N. S.) 282, note, and fully reported in 75 Journal du Palais, 225 (1864).

The case of Lloyd v. Guibert, 6 Best & S. 100, L. R. 1 Q. B. 115,

decided in the Queen's Bench before, and in the Exchequer Chamber after, the decision in the Privy Council just referred to, presented this peculiar state of facts: A French ship owned by Frenchmen was chartered by the master, in pursuance of his general authority as such, in a Danish West Indies island, to a British subject, who knew her to be French, for a voyage from St. Marc, in Hayti, to Havre, London, or Liverpool, at the charterer's option, and he shipped a cargo from St. Marc to Liverpool. On the voyage, the ship sustained damage from a storm which compelled her to put into a Portuguese port. There the master lawfully borrowed money on bottomry, and repaired the ship, and she carried her cargo safe to Liverpool. The bondholder proceeded in an English court of admiralty against the ship, freight, and cargo, which being insufficient to satisfy the bond, he brought an action at law to recover the deficiency against the owners of the ship; and they abandoned the ship and freight in such a manner as by the French law absolved them from liability. It was held that the French law governed the case, and therefore the plaintiff could not recover. It thus appears that in that case the question of the intent of the parties was complicated with that of the lawful authority of the master; and the decision in the Queen's Bench was put wholly upon the ground that the extent of his authority to bind the ship, the freight, or the owners was limited by the law of the home port of the ship, of which her flag was sufficient notice. Lloyd v. Guibert, 6 Best & S. 100. That decision was in accordance with an earlier one of Mr. Justice Story, in Pope v. Nickerson, 3 Story, 465, Fed. Cas. No. 11,274, as well as with later ones in the Privy Council, on appeal from the High Court of Admiralty, in which the validity of a bottomry bond has been determined by the law prevailing at the home port of the ship, and not by the law of the port where the bond was given. The Karnak, L. R. 2 P. C. 505, 512; The Gætano, L. R. 7 Prob. Div. 137. See, also, The Woodland, 7 Ben. 110, 118, Fed. Cas. No. 17,976; Id., 14 Blatchf. 499, 503, Fed. Cas. No. 17,977, and 104 U. S. 180, 26 L. Ed. 705.

The judgment in the Exchequer Chamber in Lloyd v. Guibert was put upon somewhat broader ground. Mr. Justice Willes, in delivering that judgment, said: "It is generally agreed that the law of the place where the contract is made is prima facie that which the parties intended, or ought to be presumed to have adopted, as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention, as, for instance, that the contract is to be entirely performed elsewhere, or that the subject-matter is immovable property situated in another country, and so forth; which latter, though sometimes treated as distinct rules, appear more properly to be classed as exceptions to the more general one, by reason of the circumstances indicating an intention to be bound by a law different from that of the place where the contract is made; which intention is inferred from the subject-matter and from the sur-

rounding circumstances, so far as they are relevant to construe and determine the character of the contract." L. R. 1 Q. B. 122, 123, 6 Best & S. 133.

It was accordingly held, conformably to the judgment in Peninsular & Oriental Co. v. Shand, above cited, that the law of England, as the law of the place of final performance or port of discharge, did not govern the case, because it was "manifest that what was to be done at Liverpool was but a small portion of the entire service to be rendered, and that the character of the contract cannot be determined thereby," although as to the mode of delivery the usages of Liverpool would govern. L. R. 1 Q. B. 125, 126, 6 Best & S. 137. It was then observed that the law of Portugal, in force where the bottomry bond was given, could not affect the case; that the law of Hayti had not been mentioned or relied upon in argument; and that, "in favor of the law of Denmark, there is the cardinal fact that the contract was made in Danish territory, and, further, that the first act done towards performance was weighing anchor in a Danish port;" and it was finally, upon a view of all the circumstances of the case, decided that the law of France, to which the ship and her owners belonged, must govern the question at issue. The decision was, in substance, that the presumption that the contract should be governed by the law of Denmark, in force where it was made, was not overcome in favor of the law of England by the fact that the voyage was to an English port and the charterer an Englishman, nor in favor of the law of Portugal by the fact that the bottomry bond was given in a Portuguese port; but that the ordinary presumption was overcome by the consideration that French owners and an English charterer, making a charter-party in the French language of a French ship, in a port where both were foreigners, to be performed partly there by weighing anchor for the port of loading, (a place where both parties would also be foreigners,) partly at that port by taking the cargo on board, principally on the high seas, and partly by final delivery in the port of discharge, must have intended to look to the law of France as governing the question of the liability of the owner beyond the value of the ship and freight.

[After commenting upon Chartered Bank of India v. Netherlands S. N. Co., 9 Q. B. D. 118, 10 Q. B. D. 521, Jacobs v. Crédit Lyonnais, 12 Q. B. D. 589, Watts v. Camors, 115 U. S. 353, 6 Sup. Ct. 91, 29 L. Ed. 406, Pope v. Nickerson, 3 Story (U. S.) 465, Fed. Cas. No. 11,274, Morgan v. New Orleans, M. & T. R. Co., 2 Woods (U. S.) 244, Fed. Cas. No. 9,804, Hale v. New Jersey Steam Nav. Co., 15 Conn. 539, 39 Am. Dec. 398, Dyke v. Erie Ry., 45 N. Y. 113, 6 Am. Rep. 43, McDaniel v. Chicago & N. W. Ry. Co., 24 Iowa, 412, Pennsylvania Co. v. Fairchild, 69 Ill. 260, Brown v. Camden & A. R. Co., 83 Pa. 316, Curtis v. Delaware, L. & W. R. Co., 74 N. Y. 116, 30 Am. Rep. 271, Barter v. Wheeler, 49 N. H. 9, 6 Am. Rep. 434, and

Gray v. Jackson, 51 N. H. 9, 12 Am. Rep. 1, the learned justice continued as follows:]

This review of the principal cases demonstrates that, according to the great preponderance, if not the uniform concurrence, of authority, the general rule that the nature, the obligation, and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment, made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country. There does not appear to us to be anything in either of the bills of lading in the present case tending to show that the contracting parties looked to the law of England, or to any other law than that of the place where the contract was made. The bill of lading for the bacon and hams was made and dated at New York, and signed by the ship's agent there. It acknowledges that the goods have been shipped "in and upon the steamship called 'Montana,' now lying in the port of New York, and bound for the port of Liverpool," and are to be delivered at Liverpool. It contains no indication that the owners of the steamship are English, or that their principal place of business is in England, rather than in this country. On the contrary, the only description of the line of steamships, or of the place of business of their owners, is in a memorandum in the margin, as follows: "Guion Line. United States Mail Steamers. New York: 29 Broadway. Liverpool: 11 Rumford St." No distinction is made between the places of business at New York and at Liverpool, except that the former is named first. The reservation of liberty, in case of an interruption of the voyage, "to tranship the goods by any other steamer," would permit transhipment into a vessel of any other line, English or American. And general average is to be computed, not by any local law or usage, but "according to York-Antwerp rules," which are the rules drawn up in 1864 at York, in England, and adopted in 1877 at Antwerp, in Belgium, at international conferences of representatives of the more important mercantile associations of the United States, as well as of the maritime countries of Europe. Lown. Av. (3d Ed.) app. Q.

The contract being made at New York, the shipowner having a place of business there, and the shipper being an American, both parties must be presumed to have submitted themselves to the law there prevailing, and to have agreed to its action upon their contract. The contract is a single one, and its principal object, the transportation of the goods, is one continuous act, to begin in the port of New York, to be chiefly performed on the high seas, and to end at the port of Liverpool. The facts that the goods are to be delivered at Liverpool, and the freight and primage, therefore, payable there in sterling currency, do not make the contract an English contract, or refer to the

English law the question of the liability of the carrier for the negligence of the master and crew in the course of the voyage. Peninsular & Oriental Co. v. Shand, Lloyd v. Guibert, and Chartered Bank of India v. Netherlands Steam Navigation Co., before cited.

There is even less ground for holding the three bills of lading of the cotton to be English contracts. Each of them is made and dated at Nashville, an inland city, and is a through bill of lading, over the Louisville & Nashville Railroad and its connections, and by the Williams and Guion Steamship Company, from Nashville to Liverpool; and the whole freight from Nashville to Liverpool is to be "at the rate of fifty-four pence sterling per 100 lbs. gross weight." It is stipulated that the liability of the Louisville & Nashville Railroad and its connections as common carriers "terminates on delivery of the goods or property to the steamship company at New York, when the liability of the steamship commences, and not before;" and that "the property shall be transported from the port of New York to the port of Liverpool by the said steamship company, with liberty to ship by any other steamship or steamship line." And in the margin is this significant reference to a provision of the statutes of the United States, applicable to the ocean transportation only: "Attention of shippers is called to the act of Congress of 1851: 'Any person or persons shipping oil of vitriol, unslacked lime, inflammable matches. [or] gunpowder, in a ship or vessel taking cargo for divers persons on freight, without delivering at the time of shipment a note in writing, expressing the nature and character of such merchandise, to the master, mate, or officer, or person in charge of the loading of the ship or vessel, shall forfeit to the United States one thousand dollars.'" Act March 3, 1851, c. 43, § 7, 9 St. 636; Rev. St. § 4288. It was argued that as each bill of lading, drawn up and signed by the carrier and assented to by the shipper, contained a stipulation that the carrier should not be liable for losses by perils of the sea arising from the negligence of its servants, both parties must be presumed to have intended to be bound by that stipulation, and must therefore, the stipulation being void by our law and valid by the law of England, have intended that their contract should be governed by the English law; and one passage in the judgment in Peninsular & Oriental Co. v. Shand gives some color to the argument. 3 Moore, P. C. (N. S.) 291. But the facts of the two cases are quite different in this respect. In that case, effect was given to the law of England, where the contract was made, and both parties were English, and must be held to have known the law of their own country. In this case, the contract was made in this country, between parties one residing and the other doing business here; and the law of England is a foreign law, which the American shipper is not presumed to know. Both parties or either of them may have supposed the stipulation to be valid; or both or either may have known that by our law, as declared by this court, it was void. In either aspect, there is no ground for inferring that the

shipper, at least, had any intention, for the purpose of securing its validity, to be governed by a foreign law, which he is not shown, and cannot be presumed, to have had any knowledge of.

Our conclusion on the principal question in the case may be summed up thus: Each of the bills of lading is an American, and not an English, contract, and, so far as concerns the obligation to carry the goods in safety, is to be governed by the American law, and not by the law, municipal or maritime, of any other country. By our law, as declared by this court, the stipulation by which the appellant undertook to exempt itself from liability for the negligence of its servants is contrary to public policy, and therefore void; and the loss of the goods was a breach of the contract, for which the shipper might maintain a suit against the carrier. This being so, the fact that the place where the vessel went ashore, in consequence of the negligence of the master and officers in the prosecution of the voyage, was upon the coast of Great Britain, is quite immaterial. This conclusion is in accordance with the decision of Judge Brown in the District Court of the United States for the Southern District of New York in The Brantford City, 29 Fed. 373, which appears to us to proceed upon more satisfactory grounds than the opposing decision of Mr. Justice Chitty, sitting alone in the Chancery Division, made since this case was argued, and, so far as we are informed, not reported in the Law Reports, nor affirmed or considered by any of the higher courts of Great Britain. In re Missouri Steam-Ship Co., 58 Law T. (N. S.) 377.

The present case does not require us to determine what effect the courts of the United States should give to this contract, if it had expressly provided that any question arising under it should be governed by the law of England. * * *

The result of these considerations is that the decree of the Circuit Court is in all respects correct and must be affirmed.[71]

[71] As to the liability of carriers in general, see 63 L. R. A. 513–534; E. Parmelee Prentice, The Right to Engage in Interstate Commerce, 17 Harv. Law Rev. 30–40.

Although the stipulation in a contract of carriage be valid under the law of the place where it was entered into, the courts of another state may decline to enforce it on the ground of public policy. The Kensington, 183 U. S. 263, 22 Sup. Ct. 102, 46 L. Ed. 190 (1902). So, a fortiori, in the face of an express statute. See Harter Act Feb. 13, 1893, c. 105, 27 Stat. 445 (U. S. Comp. St. 1901, p. 2946); Knott v. Botany Worsted Mills, 179 U. S. 69, 21 Sup. Ct. 30, 45 L. Ed. 90 (1900). But it has been held that where no part of the contract is to be performed in this country such stipulation will be given effect. The Fri, 154 Fed. 334, 83 C. C. A. 205 (1907). Two District Court decisions have upheld such stipulations, although a part of the contract was to be performed in the United States, where the injury occurred in the country under the law of which such stipulation is valid. The Trinacria (D. C.) 42 Fed. 863 (1890); Baetjer v. La Compagnie Générale Transatlantique (D. C.) 59 Fed. 789 (1894). In Kentucky the enforcement of such a stipulation is regarded as contrary to the public policy of the forum only when the damage or injury was sustained within such jurisdiction. Cleveland, C., C. & St. L. R. Co. v. Druien, 118 Ky. 237, 80 S. W. 778, 66 L. R. A. 275 (1904); Adams Express Co. v. Walker, 119 Ky. 121, 83 S. W. 106, 67 L. R. A. 412 (1904).

Continental Law.—Whether a duty exists to carry for all is determined

by the law of the place where acceptance is refused. R. G. April 11, 1901 (12 Niemeyer, 452); see 57 R. G. 142 (Feb. 25, 1904).

In the absence of an express stipulation or circumstances showing a contrary intent (see App. Paris, March 19, 1907, 34 Clunet, 1139, where the national law of the parties was applied), the obligations arising out of a contract of carriage are governed by the law of the place where such contract is made. *France*, Cass. Feb. 23, 1864 (D. 1864, 1, 166); App. Douai, June 17, 1897 (S. 1898, 2, 202); App. Douai, March 2, 1907 (35 Clunet, 456). *Italy*, art. 58, Com. Code; Cass. Turin, Aug. 23, 1887 (4 Autran, 337); Cass. Naples, Feb. 27, 1899 (14 Autran, 841); App. Naples, July 16, 1905 (21 Autran, 687). See App. Venice, Aug. 2, 1901 (Annali 1901, 3, 413). *Germany* on the other hand, applies again the law of the place of performance (R. G. April 29, 1902 [14 Niemeyer, 86]); which, however, need not be the law of the place of delivery. R. G. April 19, 1903 (33 Clunet, 196); R. G. April 29, 1903 (33 Clunet, 1168). According to the general rule in Germany, applicable to all bilateral contracts, the obligations of the parties may be subject to different laws. O. L. G. Hamburg, March 7, 1906 (18 Niemeyer, 113). Nor are all matters, exclusive of those relating directly to the performance of the contract, necessarily subject to the same law, e. g. the question of demurrage. 9 R. G. 51 (March 21, 1883). If a voyage is not completed, the liability for freight may be determined in accordance with the law of the place where the voyage ends. R. G. Jan. 23, 1897 (7 Niemeyer, 450). The liability of a connecting carrier is governed by the law to which such carrier is subject. R. G. April 10, 1901 (12 Niemeyer, 112).

Stipulations in a bill of lading may not be enforced, however, on the ground of public policy. *France*, Cass. June 12, 1894 (S. 1895, 1, 161), and note by Ch. Lyon-Caen; but see Cass. Feb. 23, 1864 (D. 1864, 1, 166).

According to German law, all rights arising under bills of lading issued for goods to be delivered in Germany will, in the interest of commercial security, be subjected to German law. 34 R. G. 72 (May 2, 1894).

International transportation by rail on the continent is governed to-day almost exclusively by the Convention of Berne of August 14, 1890, with amendment of October 10, 1901, in regard to which see Ch. Lyon-Caen, La Convention du 14 Oct., 1890, sur le transport international des marchandises par chemin de fer. 20 Clunet, 465–476; 21 Clunet, 435–471, 641–676; Léon Poinsard, Des transports internationaux par chemins de fer; 19 Clunet, 33–55; Georg Eger, Die Haftpflicht der Eisenbahnen (nach den Bestimmungen des internationalen Übereinkommens über den Eisenbahnfrachtverkehr), 3 Niemeyer, 589–606. See, also, H. Fromageot, De la loi applicable aux obligations et specialment à la responsabilité résultant pour les armateurs des contrats d'affrètement par charter-partie ou par connaissement, 18 Autran, 742–779.

As to maritime law in general, see Ch. Lyon-Caen, Études de droit international privé maritime, 4 Clunet, 479–495; 9 Clunet, 241–260, 488–500, 593–606.

Bottomry Bonds.—The law of the country to which the ship belongs has been held to govern the validity and effect of bottomry bonds. Lloyd v. Guibert [1865] L. R. 1 Q. B. 115; The Gaetano, 7 Prob. Div. 137 (1882); Pope v. Nickerson, 3 Story, 465, Fed. Cas. No. 11,274 (1844); Force v. Providence Washington Ins. Co. (D. C.) 35 Fed. 767 (1888). Accord: *France*, App. Bordeaux, April 1, 1889 (S. 1891, 2, 103); App. Alger, March 9, 1904 (31 Clunet, 673). In favor of the general maritime law as administered by the courts of the forum, Duranty v. Hart, 2 Moo. P. C. N. S. 289 (1864). In favor of the law of the place where the contract is made, *Italy*, art. 9, Prel. Disp. Civ. Code; Cass. Naples, March 1, 1883 (12 Clunet, 457); App. Genoa, Dec. 31, 1886 (16 Clunet, 169).

The mode of enforcing bottomry bonds and the rank of creditors are subject to the law of the forum. The Union, Lush. 128 (1860).

Discharge of Obligations.—See in general, Minor, Conflict of Laws, §§ 187–191. As to discharge by performance, see Graham v. First Nat. Bank, 84 N. Y. 393, 38 Am. Rep. 528 (1881), ante, p. 345. As to discharge by nonperformance, see Mutual Life Ins. Co. v. Cohen, 179 U. S. 262, 21 Sup. Ct. 106, 45 L. Ed. 181 (1900); Amsinck v. Rogers, 189 N. Y. 252, 82 N. E. 134, 12 L. R. A. (N. S.) 875 (1907), ante, p. 427; Tenant v. Tenant, 110 Pa. 478, 1 Atl. 532 (1885), ante p. 415. As to discharge by postponement of performance, see

SECTION 2.—TORTS.

CARR v. FRACIS TIMES & CO.

(House of Lords [1902] A. C. 176, 71 L. J. K. B. 361.)

In 1898 the appellant, an officer of the British navy in command of H. M. S. Lapwing, acting under the orders of the British government, seized in the territorial waters of Muscat ammunition belonging to the respondents which had been shipped by them in London on board the Baluchistan. The respondents having brought an action against the appellant for the conversion of the goods, the defense was that the seizure was lawful by the law of Muscat, having been

Rouquette v. Overmann [1875] L. R. 10 Q. B. 525, ante, p. 439. As to discharge by release, see Greenwald v. Kaster, 86 Pa. 45 (1878); Suydam v. Barber, 18 N. Y. 468, 75 Am. Dec. 254 (1858); Seymour v. Butler, 8 Iowa, 304 (1859). As to discharge by acceptance of note, see Tarbox v. Childs, 165 Mass. 408, 43 N. E. 124 (1896).

As to discharge of obligations by operation of the statute of limitations, see ante, pp. 62–74.

Under the federal bankruptcy acts, the debts of nonresident aliens have been held to be discharged though they were not parties to the proceedings. Zarega's Case, Fed. Cas. No. 18,204 (1842); Pattison v. Wilbur, 10 R. I. 448 (1873); Ruiz v. Eickerman, 5 Fed. 790, 2 McCrary, 259 (1881). Contra: McDougall v. Page, 55 Vt. 187, 45 Am. Rep. 602 (1882).

A discharge under state insolvency proceedings is ineffective, even within the state where such discharge is had, with respect to citizens of the United States who are nonresidents of such state, if no personal jurisdiction over the creditor is obtained. Baldwin v. Hale, 1 Wall. 223, 17 L. Ed. 531 (1863); Gilman v. Lockwood, 4 Wall. 409, 18 L. Ed. 432 (1866); Pullen v. Hillman, 84 Me. 129, 24 Atl. 795, 30 Am. St. Rep. 340 (1891); Phœnix Nat. Bank v. Batcheller, 151 Mass. 589, 24 N. E. 917, 8 L. R. A. 644 (1890). Compare: Adams v. Batcheller, 173 Mass. 258, 53 N. E. 824, 73 Am. St. Rep. 282 (1899). This is true, although the debt arose out of a contract entered into or to be performed or both entered into and to be performed in the state where such proceedings took place. Gilman v. Lockwood, 4 Wall. 409, 18 L. Ed. 432 (1866); Hammond Beef & Provision Co. v. Best, 91 Me. 431, 40 Atl. 338, 42 L. R. A. 528 (1898); Phœnix Nat. Bank v. Batcheller, 151 Mass. 589, 24 N. E. 917, 8 L. R. A. 644 (1890). The same principle has been held applicable to corporations created under the laws of a sister state. Bergner & Engel Brewing Co. v. Dreyfus, 172 Mass. 154, 51 N. E. 531, 70 Am. St. Rep. 251 (1898).

A discharge under the law of a foreign country will not be recognized in the United States with regard to creditors who were not parties to such proceedings (Phelps v. Borland [1886] 103 N. Y. 406, 9 N. E. 307, 57 Am. St. Rep. 755 [obiter]); at least if the debt was made in and with reference to the laws of this country or a country other than the one where the discharge was had. McMillan v. McNeill, 4 Wheat. 209, 4 L. Ed. 552 (1819); Green v. Sarmiento, Fed. Cas. No. 5,760 (1810); In re Shepard (1868) Fed. Cas. No. 12,753 (obiter). With respect to corporations created under the laws of a foreign country, see Canada Southern R. Co. v. Gebhard, 109 U. S. 527, 3 Sup. Ct. 363, 27 L. Ed. 1020 (1883). See, also, Minor, Conflict of Laws, § 191; Wharton, Conflict of Laws, §§ 522–529a; Hollis R. Bailey, A discharge in insolvency and its effect upon nonresidents, 6 Harv. Law Rev. 349–368.

As to the English doctrine, see Gibbs v. Société Industrielle, 29 Q. B. D. 399 (1890); Dicey, Conflict of Laws, Rules 114–117; Westlake, Priv. Int. Law, 306.

authorized by a proclamation issued by the Sultan, the sovereign ruler, of Muscat, and pronounced to be lawful by a court of inquiry in Muscat, whose decision was confirmed by the Sultan. Evidence of this was given at the trial. The effect of the proclamation and inquiry is stated in Lord Lindley's judgment. Grantham, J., who tried the case with a jury, entered judgment for the defendant. The Court of Appeal (A. L. SMITH, VAUGHAN WILLIAMS, and ROMER, L. JJ.) reversed this decision, and entered judgment for the plaintiff for the value of the ammunition.

Lord MACNAGHTEN. This case has been very fully and very ably argued, but after all it comes to an extremely short point. The respondents, who are, or were, merchants carrying on business in London, Bushire, and Muscat, sue the appellant, a captain in the British navy, for an alleged wrong committed abroad. He seized their goods, as they allege, illegally, and they claim compensation in damages.

Now, it is well settled by a series of authorities (of which the latest is the case of Phillips v. Eyre, L. R. 6 Q. B. 1, in the Exchequer Chamber), that in order to found an action in this country for a wrong committed abroad two conditions must be fulfilled. In the first place, the wrong must be of such a character that it would have been actionable if committed in England; and, secondly, the act must not have been justifiable by the law of the place where it was committed. In the present case the whole question turns upon the second proposition. It is not disputed that the alleged wrong would have been actionable if it had been committed in England or on the high seas. It was, however, committed within the dominions of the Sultan of Muscat, who is duly proved to be an independent sovereign. It was committed in the territorial waters of Muscat, which are, in my opinion, for this purpose, as much a part of the Sultan's dominions as the land over which he exercises absolute and unquestioned sway.

The appellant says that the act complained of was done under the authority and by the direction of the Sultan; that he adopted it as his act, and declared it to be legal. In support of this assertion the appellant relies upon two documents—the proclamation of January 13, 1898, and the report of April 15, 1898, adopted and confirmed by the Sultan himself. The real question is, what is the true meaning and effect of these documents?

The respondents contend that the documents in question come to nothing more than this: That the Sultan of Muscat announced by formal proclamation that so far as he was concerned her Britannic Majesty was welcome to seize munitions of war destined for Indian or Persian ports, if they were the property of British subjects, when found within the territorial waters of Muscat; that he would not resent such an act as an invasion of his sovereignty; and that afterwards, on inquiry, he declared that he was satisfied that her Britannic Majesty had done no more that he had permitted her to do. I do not think that this was the meaning of these documents. I think the mean-

ing was that the act, if done, was to be done under his authority, as his act, and that after inquiry he adopted the act as his own, and declared it to be legal—legal, that is, according to the law of Muscat, which, for anything I know to the contrary, may be nothing more than the will and pleasure of the despot who rules over that country. If this was the true meaning of these documents—if the act was legal in Muscat, and therefore justifiable there—in my opinion there is a conclusive answer to the action, and I am therefore of opinion that the appeal must be allowed.

Order of Court of Appeal reversed.[72]

MACHADO v. FONTES.

(Court of Appeal, 1897. 2 Q. B. 231, 66 L. J. Q. B. 542.)

Appeal from Kennedy J., at chambers.

The plaintiff brought this action to recover damages from the defendant for an alleged libel upon the plaintiff contained in a pamphlet in the Portuguese language alleged to have been published by the defendant in Brazil.

The defendant delivered a statement of defence (in which, amongst other defences, he denied the alleged libel), and he afterwards took out a summons for leave to amend his defence by adding the following plea: "Further the defendant will contend that if (contrary to the defendant's contention) the said pamphlet has been published in Brazil, by the Brazilian law the publication of the said pamphlet in Brazil cannot be the ground of legal proceedings against the defendant in Brazil in which damages can be recovered, or (alternatively) cannot be the ground of legal proceedings against the defendant in Brazil in which the plaintiff can recover general damages for any injury to his credit, character, or feelings."

The summons came before Kennedy J. in chambers, who allowed the plea to be added, but expressed some doubt as to the propriety of so doing, and gave leave to plaintiff to bring the present appeal.

LOPES, L. J. I am of opinion that this appeal ought to be allowed. [The Lord Justice then referred to the facts, and, after reading the plea, continued:]

Now that plea, as it stands, appears to me merely to go to the remedy. It says, in effect, that in this case no action in which damages could be recovered would lie in Brazil, and, assuming that any damages could be recovered in Brazil, they would be special damages only. Mr. Walton contends that that is not the meaning of the plea: that the plea is intended to raise a larger question than that, and to say

[72] The Lord Chancellor (Earl of Halsbury) and Lord Lindley delivered concurring opinions. Lord Shand and Lord Brampton concurred.

① Look first to see if a wrong by domestic law.
② Then look to foreign law.

Ans. court enters ① Is it a wrong when act is done? and that is all. If it is, the right accrued will be enforced, even if no wrong here.

that libel cannot be made the subject of any civil proceedings at all in Brazil, but is only the subject-matter of criminal proceedings; and, for the purposes of what I am about to say, I will assume that to be so.

Now the principle applicable in the present case appears to me to be this: where the words have been published outside the jurisdiction, then, in order to maintain an action here on the ground of a tort committed outside the jurisdiction, the act complained of must be wrongful—I use the word "wrongful" deliberately—both by the law of this country, and also by the law of the country where it was committed; and the first thing we have to consider is whether those conditions are complied with.

In the case of Phillips v. Eyre, L. R. 6 Q. B. 1, Willes J. lays down very distinctly what the requisites are in order to found such an action. He says this, L. R. 6 Q. B. 1, at p. 28: "As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled: First, the wrong must be of such a character that it would have been actionable if committed in England. * * * Secondly, the act must not have been justifiable by the law of the place where it was done." Then in the M. Moxham, 1 P. D. 107, James L. J., in the course of his judgment, uses these words, 1 P. D. 107, at p. 111: "It is settled that if by the law of the foreign country the act is lawful or is excusable, or even if it has been legitimized by a subsequent act of the Legislature, then this Court will take into consideration that state of the law—that is to say, if by the law of the foreign country a particular person is justified, or is excused, or has been justified or excused for the thing done, he will not be answerable here."

Both those cases seem to me to go this length: that, in order to constitute a good defence to an action brought in this country in respect of an act done in a foreign country, the act relied on must be one which is innocent in the country where it was committed. In the present case there can be no doubt that the action lies, for it complies with both of the requirements which are laid down by Willes J. The act was committed abroad, and was actionable here, and not justifiable by the law of the place where it was committed. Both those conditions are complied with; and, therefore, the publication in Brazil is actionable here.

It then follows, directly the right of action is established in this country, that the ordinary incidents of that action and the appropriate remedies ensue.

Therefore, in this case, in my opinion, damages would flow from the wrong committed just as they would in any action brought in respect of a libel published in this country.

It is contended that it would be much better that this question should not be decided at the present time, but that a commission should go to Brazil, and that the Brazilian law should be inquired into. If our view is correct, it seems to me that that would be a great waste

of time and money, because, having regard to the authorities I have mentioned, this plea is absolutely bad, and ought to be struck out.

RIGBY, L. J. I am of the same opinion. I do not propose to decide this case on any technical consideration as to what may be the precise meaning of the allegation that is proposed to be introduced into the defence; I give it the widest possible construction it can reasonably bear; and I will assume it to involve that no action for damages, or even no civil action at all, can be maintained in Brazil in respect of a libel published there. But it does not follow from that that the libel is not actionable in this country under the present conditions, and having regard to the fact that the plaintiff and defendant are here.

Willes J., in Phillips v. Eyre, L. R. 6 Q. B. 1, was laying down a rule which he expressed without the slightest modification, and without the slightest doubt as to its correctness; and when you consider the care with which the learned judge prepared the propositions that he was about to enunciate, I cannot doubt that the change from "actionable" in the first branch of the rule to "justifiable" in the second branch of it was deliberate. The first requisite is that the wrong must be of such a character that it would be actionable in England. It was long ago settled that an action will lie by a plaintiff here against a defendant here, upon a transaction in a place outside this country. But though such action may be brought here, it does not follow that it will succeed here, for, when it is committed in a foreign country, it may turn out to be a perfectly innocent act according to the law of that country; and if the act is shewn by the law of that country to be an innocent act, we pay such respect to the law of other countries that we will not allow an action to be brought upon it here. The innocency of the act in the foreign country is an answer to the action. That is what is meant when it is said that the act must be "justifiable" by the law of the place where it was done.

It is not really a matter of any importance what the nature of the remedy for a wrong in a foreign country may be.

The remedy must be according to the law of the country which entertains the action. Of course, the plea means that no action can be brought in this country in respect of the libel (if any) in Brazil. But I think the rule is clear. It was very carefully laid down by Willes J. in Phillips v. Eyre, L. R. 6 Q. B. 1; and in the case of The M. Moxham, 1 P. D. 107, all the learned judges of the Court of Appeal in their judgments laid down the law without hesitation and in a uniform manner; and first one judge and then another gave, in different language but exactly to the same purport and effect, the rule enunciated by Willes J. So that if authority were wanting there is a decision clearly binding upon us, although I think the principle is sufficient to decide the case.

I think there is no doubt at all that an action for a libel published abroad is maintainable here, unless it can be shown to be justified or excused in the country where it was published. James L. J. states

in The M. Moxham, 1 P. D. 107, what the settled law is. Mellish L. J. is quite as clear upon that point as James L. J. in laying down the general rule; and Baggallay L. J. also takes the same view. We start, then, from this: that the act in question is prima facie actionable here, and the only thing we have to do is to see whether there is any peremptory bar to our jurisdiction arising from the fact that the act we are dealing with is authorized, or innocent or excusable, in the country where it was committed. If we cannot see that, we must act according to our own rules in the damages (if any) which we may choose to give. Here we cannot see it, and this appeal must be allowed with costs.

Appeal allowed.

THE HALLEY.

(Judicial Committee of the Privy Council, 1868. L. R. 2 P. C. 193, 37 L. J. Adm. 33.)

The Lord Justice SELWYN.[73] This is an appeal from an order by the judge of the High Court of Admiralty, dated the 26th of November, 1867, and admitting the third article of the reply filed by the plaintiffs in the court below, who are the present respondents.

The cause is a cause of damage promoted by the respondents as owners of a Norwegian barque called the Napoleon, against a British steamship called the Halley, and her owners, for the recovery of damages occasioned to the Respondents by reason of a collision which took place on the 8th of January, 1867, in Flushing Roads, between the Napoleon and the Halley.

In their petition the respondents state that the collision was caused by the negligent and improper navigation of the Halley.

The appellants, in their answer to that petition, state that the Halley is a steamship belonging to the port of Liverpool, and that "by the Belgian or Dutch laws which prevail in and over the river Scheldt, and to which the said river is subject, from the place where the said river pilot came on board the Halley, and thence up to and beyond the place of the aforesaid collision, it was compulsory on the said steamer to take on board and be navigated under the direction and in charge of a pilot duly appointed or licensed according to the said laws; and it was by virtue of such laws that the Halley was compelled to take on board and to be given in charge, and until the time of the said collision, as aforesaid, to remain in charge of, and did take on board and was given in charge, and up to the time of the said collision remained in charge of the said river pilot, who was duly appointed or licensed according to the said laws, and whom the defendants or their agents did not select and had no power of se-

[73] Statement of facts and arguments of counsel omitted.

lecting;" and "that the collision was not caused by the negligence, default, want of skill, or improper conduct of any person on board the Halley, except the said river pilot."

In reply to this answer, the respondents pleaded the following, being the third article in their reply:—"By the Belgian or Dutch laws in force at the time and place of the said collision, the owners of a ship which has done damage to another ship by collision, are liable to pay and make good to the owners of such lastly-mentioned ship all losses occasioned to them by reason of such collision, notwithstanding that the ship which has done such damage was, at the time of the doing thereof, being navigated under the direction and in charge of a pilot duly appointed or licensed according to the said laws, and notwithstanding that such damage was solely occasioned by the negligence, default, or want of skill of such pilot, without any contributory negligence on the part of the master or crew of such lastly-mentioned ship, and notwithstanding that it was at the time and place of the collision, by the said laws, compulsory on such lastly-mentioned ship to be navigated under the direction and in charge of such pilot; and the defendants, the owners of the Halley, are by virtue of the said laws, liable to pay and make good to the plaintiffs all losses occasioned to them by the said collision, even if the statements contained in the eleventh article of the said answer be true."

The appellants having moved the court below to reject the third article of the reply, on the ground that, even if the third article were true, the appellants would not be liable in the Court of Admiralty in England, the learned judge of that court has made the order now under appeal, by which he has refused the motion of the appellants, and has sustained the third article of the reply.

The claim of the respondents is stated by the learned judge to be founded upon a tort committed by the defendants in the territory of a foreign state, and we are not called upon to pronounce any opinion as to the rights which the respondents might have obtained, either against the appellants as the owners of the Halley, or as against that ship, if the respondents had instituted proceedings and obtained a judgment in the foreign court. For this cause is a cause for damage instituted by petition in the High Court of Admiralty in England; and it is admitted by the counsel for the respondents that the question before us must be decided upon the same principles as would be applicable to an action for damages for the collision in question if commenced in the Court of Queen's Bench or Common Pleas. But it is contended on their part, and has been held by the learned judge in the court below, that the respondents are entitled to plead that the law of Belgium, within whose territorial jurisdiction the collision took place, renders the owners of the Halley, although compelled to take a pilot on board, liable to make reparation for the injury which she has done.

Their Lordships agree with the learned judge in his statement of the common law of England, with respect to the liability of the owner of a vessel for injuries occasioned by the unskilful navigation of his vessel, while under the control of a pilot, whom the owner was compelled to take on board, and in whose selection he had no voice; and that this law holds that the responsibility of the owner for the acts of his servant is founded upon the presumption that the owner chooses his servant and gives him orders which he is bound to obey, and that the acts of the servant, so far as the interests of third persons are concerned must always be considered as the acts of the owner.

This exemption of the owner from liability when the ship is under the control of what has been termed a "compulsory pilot" has also been declared by express statutory enactments. Vide Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, s. 388.

In cases like the present, when damages are claimed for tortious collisions, a chattel, such as a ship or carriage, may be, and frequently is, figuratively spoken of as the wrongdoer; but it is obvious, that although redress may sometimes be obtained by means of the seizure and sale of the ship or carriage, the chattel itself is only the instrument by the improper use of which the injury is inflicted by the real wrongdoer.

Assuming, as, for the purposes of this appeal, their Lordships are bound to assume, the truth of the facts stated in the pleadings, and applying the principles of the common law and statute law of England to those facts, it appears that the tort for which damages are sought to be recovered in this cause was a tort occasioned solely by the negligence or unskilfulness of a person who was in no sense the servant of the appellants, a person whom they were compelled to receive on board their ship, in whose selection they had no voice, whom they had no power to remove or displace, and who, so far from being bound to receive or obey their orders, was entitled to supersede, and had, in fact, at the time of the collision, superseded, the authority of the master appointed by them; and their Lordships think that the maxim, "qui facit per alium, facit per se," cannot by the law of England be applied, as against the appellants, to an injury occasioned under such circumstances; and that the tort upon which this cause is founded is one which would not be recognized by the law of England as creating any liability in, or cause of action against, the appellants.

It follows, therefore, that the liability of the appellants, and the right of the respondents to recover damages from them, as the owners of the Halley, if such liability or right exists in the present case, must be the creature of the Belgian law; and the question is, whether an English court of justice is bound to apply and enforce that law in a case, when, according to its own principles, no wrong has been committed by the defendants, and no right of action against them exists.

The counsel for the respondents, when challenged to produce

any instance in which such a course had been taken by any English court of justice, admitted his inability to do so, and the absence of any such precedent is the more important, since the right of all persons, whether British subjects or aliens, to sue in the English courts for damages in respect of torts committed in foreign countries has long since been established; and, as is observed in the note to Mostyn v. Fabrigas, in Smith's Leading Cases, vol. 1, p. 656, there seems to be no reason why aliens should not sue in England for personal injuries done to them by other aliens abroad, when such injuries are actionable both by the law of England and also by that of the country where they are committed, and the impression which had prevailed to the contrary seems to be erroneous.

In the case of The Amalia, 1 Moore's P. C. Cases (N. S.) 484, Lord Chelmsford, in delivering the opinion of the Judicial Committee, said "Suppose the foreigner, instead of proceeding in rem against the vessel, chooses to bring an action for damages in a court of law against the owners of the vessel occasioning the injury, the argument arising out of the acquired lien would be at once swept away, and the rights and liabilities of the parties be determined by the law which the court would be bound to administer."

As Mr. Justice Story has observed in his Conflict of Laws, p. 32, "it is difficult to conceive upon what ground a claim can be rested to give to any municipal laws an extra-territorial effect, when those laws are prejudicial to the rights of other nations or to those of their subjects." And even in the case of a foreign judgment which is usually conclusive inter partes, it is observed in the same work, at § 618a, that the courts of England may disregard such judgment inter partes if it appears on the record to be manifestly contrary to public justice, or to be based on domestic legislation not recognised in England or other foreign countries, or is founded upon a misapprehension of what is the law of England: Simpson v. Fogo, 1 H. & M. 195.

It is true that in many cases the courts of England inquire into and act upon the law of foreign countries, as in the case of a contract entered into in a foreign country, where, by express reference, or by necessary implication, the foreign law is incorporated with the contract, and proof and consideration of the foreign law therefore become necessary to the construction of the contract itself. And as in the case of a collision on an ordinary road in a foreign country, where the rule of the road in force at the place of collision may be a necessary ingredient in the determination of the question by whose fault or negligence the alleged tort was committed. But in these and similar cases the English court admits the proof of the foreign law as part of the circumstances attending the execution of the contract, or as one of the facts upon which the existence of the tort, or the right to damages, may depend, and it then applies and enforces its own law so far as it is applicable to the case thus established; but it is, in their

Lordships' opinion, alike contrary to principle and to authority to hold, that an English court of justice will enforce a foreign municipal law, and will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed.

The case of Smith v. Condry, 1 How. (U. S.) 28, 11 L. Ed. 35, in the Supreme Court of the United States, appears at first sight to have an important bearing upon this case; but, upon an investigation of the report, it does not appear that any question as to a conflict between the English law and the American law was discussed in that case, or that the precise point now under consideration was noticed in the judgment, nor is it specifically mentioned in any of the three exceptions which were taken to the decision of the inferior court, and there is no report of the arguments.

Their Lordships think, therefore, that that case cannot be treated as an authority sufficient to support the contention of the respondents; and, on the whole, they think it their duty humbly to advise her Majesty to allow this appeal, and to order that the third article of the plaintiff's reply be rejected, and that there should be no costs of this appeal.[74]

MORRISETTE v. CANADIAN PAC. R. CO.

(Supreme Court of Vermont, 1904. 76 Vt. 267, 56 Atl. 1102.)

STAFFORD, J.[75] The plaintiff was a brakeman upon one of the defendant's freight trains, and claimed to have been injured through the negligence of the company in maintaining a switch too near the track, so that when he was attempting to mount a moving car he struck against it and was knocked off. The accident occurred in the Province of Quebec, and the declaration, treating the law of the province as matter of fact, alleges that the defendant, as employer of the plaintiff, owed him the care and oversight which the good father of a family owes to his children, and was bound to guard him even against his own mistakes and thoughtlessness; that neither assumption of risk nor contributory negligence constituted a bar to the right of recovery, but operated only to reduce the damages. The defendant objected to any and all evidence of the law of Quebec, upon the ground that, as it was alleged in the declaration, it was "in direct conflict with the law of Vermont, and related, not to the right of action, but solely to the remedy." The objections stated were overruled, an exception was allowed, and the plaintiff introduced evidence in support of his allegations. Under this exception the defendant in

[74] Accord: 29 R. G. 90 (June 25 and July 9, 1892), on ground that section 738, Com. Code, contains an absolute and positive rule of law.

[75] A part of the opinion has been omitted.

this court presents the objection that the plaintiff should not have been permitted to make good his declaration touching the law of the province on the subject of contributory negligence, because he had also alleged that the plaintiff was in fact wholly free from fault; that, having made the latter allegation, he was bound to prove it. This question is not raised by the objection and exception, and is not considered.

It is next objected that evidence as to the law of contributory negligence was inadmissible because it related, not to the right of action, but only to the remedy. But we think it related clearly to the right of action. By the law of Vermont it was a bar; by the law of Canada, as the evidence in question tended to show, it was not a bar.

It is further objected that the Canadian law, as alleged, although neither criminal nor penal, is so different from ours that we ought not to administer it. Comity does not require us to take up and enforce the law of a foreign state which is contrary to pure morals, or to abstract justice, or to enforce which would be contrary to our own public policy. The law we are considering is not claimed to be open to either of the first two objections, but is claimed to be open to the third, because it is so different from the law of Vermont. Some states have adopted this view, declining to administer foreign laws unless closely analogous to their own. Mexican Nat. Ry. Co. v. Jackson, 89 Tex. 107, 33 S. W. 857, 31 L. R. A. 276, 59 Am. St. Rep. 28; Anderson v. Milwaukee & St. P. Ry. Co., 37 Wis. 321; Richardson v. New York Cent. R. Co., 98 Mass. 85. But we believe the sounder opinion is that a court should not, in otherwise proper cases, refuse to adopt and apply the law of a foreign state, however unlike the law of its own, unless it be contrary to pure morals, or abstract justice, or unless the enforcement would be of evil example, and harmful to its own people, and therefore inconsistent with the dignity of the government whose authority is invoked. Judged by that test, the ruling was correct. Herrick v. Minneapolis & St. L. Ry. Co., 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771; Higgins v. Central N. E. & W. R. Co., 155 Mass. 180, 29 N. E. 534, 31 Am. St. Rep. 544; Dennick v. Central R. Co. of New Jersey, 103 U. S. 11, 26 L. Ed. 439; McLeod v. Connecticut & P. R. R. Co., 58 Vt. 727, 6 Atl. 648; Chicago & E. I. R. Co. v. Rouse, 178 Ill. 132, 52 N. E. 951, 44 L. R. A. 410.

It was still further objected that in the circumstances of this case a resort to our tribunals was so needless and so embarrassing that the county court should have refused to entertain the complaint. See Great Western Ry. Co. of Canada v. Miller, 19 Mich. 306; Gardner v. Thomas, 14 Johns. 134, 7 Am. Dec. 445. The defendant is a Canadian corporation. The plaintiff is a resident of Canada, and there the accident occurred. The courts of the Dominion were open to the plaintiff. The witnesses could there have been compelled to attend and testify in person. A view could have been ordered, if necessary, and the governing law would have been determined by judges with-

out the necessity of a tedious and perplexing trial by jury to settle the law as a question of fact. Without saying what might or ought to have been done if a motion to this effect had been made at the outset of the case, we do not feel at liberty at this time and under this exception to say that the proceeding should have been dismissed. The exception was merely to the admission of evidence concerning the law of Canada on the ground that the case was governed by the law of Vermont—a position that cannot be sustained. Morrisette v. Canadian Pac. Ry. Co., 74 Vt. 232, 52 Atl. 520. * * *

DYKE v. ERIE RY. CO.

(Court of Appeals of New York, 1871. 45 N. Y. 113, 6 Am. Rep. 43.)

Appeals from the General Term of the Supreme Court in the Second district in Dike's case, and from the General Term of the Supreme Court in the Sixth district in Floyd's case.

These actions were to recover damages for personal injuries sustained by the plaintiffs while passing over the road of the defendant as passengers, caused by the negligence of the defendant's servants and agents. The defendant is a corporation existing under the laws of the state of New York, owning and operating a railroad for the carriage of freight and passengers between the cities of Buffalo and New York, in that State, and the intermediate places, running its road, en route between the terminal named, for short distances in the States of Pennsylvania and New Jersey by the permission of those States respectively.

Each of the plaintiffs purchased a ticket and took passage on the defendant's road, on the 14th of April, 1868, from stations in this state to the city of New York, and while in transit from the place of departure to the city of New York, and upon a part of the road in the State of Pennsylvania, sustained the injuries complained of. By an act of the legislature of Pennsylvania, passed April 4th, 1868 (P. L. 58), the recovery in actions then or thereafter instituted against common carriers or railroad corporations for personal injuries is limited to $3,000. Upon the trials, it was claimed in behalf of the defendant that the rights of recovery of the plaintiffs were controlled by this act. The claim was overruled by the judge, and each of the plaintiffs had verdicts in excess of the limit prescribed by the Pennsylvania statute, Dike for $35,000, at the Kings Circuit, and Floyd for $15,000 at the Tioga Circuit, and judgments upon such verdicts were affirmed by the Supreme Court at the General Terms. The defendant has appealed to this court.

ALLEN, J. The only question to be considered upon this appeal is as to the effect of the Pennsylvania statute, limiting the amount of

the recovery in actions of this character. It is conceded that the statutes of one State are not obligatory upon the courts of other States; that they have not, proprio vigore, the force of law beyond the limits of the State enacting them. But it is sought to bring these actions within the operation and effect of the foreign statute upon the ground that the contracts were made with reference to the laws of that State, and the causes of action arose there.

The generally received rule for the interpretation of contracts, is that they are to be construed and interpreted according to the laws of the State in which they are made unless from their terms, it is perceived that they were entered into with a view to the laws of some other State. The lex loci contractus, determines the nature, validity, obligation and legal effect of the contract, and gives the rule of construction and interpretation, unless it appears to have been made with reference to the laws and usages of some other State or government, as when it is to be performed in another place, and then in conformity to the presumed intention of the parties, the law of the place of performance furnishes the rule of interpretation. (Prentiss v. Savage, 13 Mass. 20; Medbury v. Hopkins, 3 Conn. 472; Everett v. Vendryes, 19 N. Y. 436; Hoyt v. Thompson's Exr., Id. 207; Curtis v. Leavitt, 15 N. Y. 227.) The contracts before us were made in the State of New York, and between citizens of that State. The plaintiffs were actual inhabitants, and the defendant was a corporation existing by the laws of that State. The contracts were for the carriage and conveyance of the plaintiffs over the road of the defendant, between two places in the same State, to wit, from stations on the line of the road, in the western part of the State to the city of New York. The duty and obligation of the defendant, in the performance of the contracts commenced and ended within the State of New York. Although the route and line of defendant's road between the places at which the plaintiffs took their passage and their destination, passed through portions of the States of Pennsylvania and New Jersey, by the consent of those States respectively, the parties cannot be presumed to have contracted in view of the laws of those States. The contracts were single and the performance one continuous act. The defendant did not undertake for one specific act, in part performance in one State, and another specific and distinct act in another of the States named, as to which the parties could be presumed to have had in view the laws and usages of distinct places. Whatever was done in Pennsylvania, was a part of the single act of transportation from Attica, or Waverly, in the State of New York, to the city of New York, and in performance of an obligation assumed and undertaken in this State, and which was indivisible. The obligation was created here, and by force of the laws of this State, and force and effect must be given to it, in conformity to the laws of New York. (Carnegie v. Morrison, 2 Metc. (Mass.) 381, Per Shaw, Ch. J. The performance was to commence in New York, and to be fully completed in the

same State, but liable to breach, partial or entire in the States of Pennsylvania and New Jersey, through which the road of the defendant passed, but whether the contract was broken, and if broken, the consequences of the breach should be determined by the laws of this State. It cannot be assumed that the parties intended to subject the contract to the laws of the other States, or that their rights and liabilities should be qualified or varied by any diversities that might exist between the laws of those States and the lex loci contractus. The case of the Peninsular and Oriental Steam Navigation Co. v. Shand (3 Moore's P. C., 272), is somewhat analogous in principle to the case at bar. A passenger, by an English vessel belonging to an English company, from Southampton to Mauritius, via Alexandria and Suez, sustained a loss of his baggage between Alexandria and Mauritius, and it was held that the contract for the passage was to be interpreted by the law of England, the place where the contract was made. The Supreme Court at Mauritius had held that the contract was governed by the French law in force in Mauritius, and refused to the defendants the benefit of an exemption from liability for loss of property, to which they were entitled by the terms of the contract as interpreted by the laws of England, and the judgment was reversed, upon appeal, by the Privy Council.

Whether the actions are regarded as actions of assumpsit upon the contracts, or as actions upon the case for negligence, the rights and liabilities of the parties must be judged by the same standard. The form of the action concerns the remedy, but does not affect the legal obligations of the parties. In either form of action the liability of the defendant, and the rights of the plaintiffs, are based upon the contracts. The defendant owed no duty to the plaintiffs, except in virtue of the contracts and the obligations for the violation and breach of which an action may be brought are only co-extensive with the contracts made. It follows, that the law of Pennsylvania cannot enlarge or restrict the liability of parties to a contract, which for its validity, effect, and construction, is subject to the laws of New York. The damages to which a party is entitled, upon the breach of a contract, or violation of a duty growing out of a contract, and the rule and measure of damages pertains to the right and not to the remedy. It is matter of substance, and the principal thing sought, and not a mere incident to the remedy for the principal thing. It is conceded, that the statutes of Pennsylvania have no intrinsic extra territorial force, and that they bind only within the jurisdictional limits of the State. Upon principles of comity, effect is sometimes given by the courts of a State to foreign laws. In matters of contract, such effect is accorded to statutes of other States, only to carry out the intent of and do justice between the parties, never to qualify or vary the effect of a contract between parties not citizens of such foreign State, or subject to its laws, and not made in view of the laws of such State. Effect will not be given by the courts of a State to foreign laws in

derogation of the contracts, or prejudicial to the rights of citizens. (Liverpool, Brazil, &c., Steam Navigation Company v. Benham, 2 Law Rep., P. C. Cases, 193; Hale v. New Jersey Steam Nav. Co., 15 Conn. 539, 39 Am. Dec. 398; Arnott v. Redfern, 2 Carr. & Payne, 88; Gale v. Eastman, 7 Metc. [Mass.] 14.)

The actions are not given by the laws of Pennsylvania. They grow out of the contracts and the duties resulting from the contracts, and are given by the common law, and, therefore, the laws of another State in an action brought here cannot prescribe the measure of damages, or limit the liability of the parties.

The judgments should be affirmed.

ALABAMA GREAT SOUTHERN R. CO. v. CARROLL

(Supreme Court of Alabama, 1892. 97 Ala. 126, 11 South. 803, 18 L. R. A. 433, 38 Am. St. Rep. 163.)

Action by W. D. Carroll, a citizen of Alabama, against the Alabama Great Southern R. R. Co., an Alabama corporation, to recover damages for personal injuries received in Mississippi while serving as a brakeman on defendant's road. Judgment for plaintiff.

McCLELLAN, J.[76] [After holding that under the law of Mississippi the defendant corporation was not liable to plaintiff on account of injury sustained in consequence of the negligence of a fellow-servant, and that no recovery could be had under the employers' liability act of Alabama, since only the negligence which produced the casualty had occurred in Alabama while the injuries had been received in Mississippi, the learned Justice continued as follows:]

Another consideration,—that referred to above,—it is insisted, entitles this plaintiff to recover here under the employers' liability act for an injury inflicted beyond the territorial operation of that act. This is claimed upon the fact that at the time plaintiff was injured he was in the discharge of duties which rested on him by the terms of a contract between him and the defendant, which had been entered into in Alabama, and hence was an Alabama contract, in connection with the facts that plaintiff was and is a citizen of this state, and the defendant is an Alabama corporation. These latter facts—of citizenship and domicile, respectively, of plaintiff and defendant—are of no importance in this connection, it seems to us, further than this: they may tend to show that the contract was made here, which is not controverted, and, if the plaintiff has a cause of action at all, he, by reason of them, may prosecute it in our courts. They have no bearing on the primary question of the existence of a cause of action, and, as that is the question before us, we need not further advert to the fact of plaintiff's citizenship or defendant's domicile.

[76] A part of the opinion has been omitted.

The contract was that plaintiff should serve the defendant in the capacity of a brakeman on its freight trains between Birmingham, Ala., and Meridian, Miss., and should receive as compensation a stipulated sum for each trip from Birmingham to Meridian and return. The theory is that the employers' liability act became a part of this contract, that the duties and liabilities which it prescribes became contractual duties and liabilities, or duties and liabilities springing out of the contract, and that these duties attended upon the execution whenever its performance was required, in Mississippi as well as in Alabama, and that the liability prescribed for a failure to perform any of such duties attached upon such failure and consequent injury wherever it occurred, and was enforceable here, because imposed by an Alabama contract, notwithstanding the remission of duty and the resulting injury occurred in Mississippi, under whose laws no liability was incurred by such remission. The argument is that a contract for service is a condition precedent to the application of the statute, and that, "as soon as the contract is made, the rights and obligations of the parties under the employers' act became vested and fixed," so that "no subsequent repeal of the law could deprive the injured party of his rights, nor discharge the master from his liabilities," etc. If this argument is sound, and it is sound if the duties and liabilities prescribed by the act can be said to be contractual duties and obligations at all, it would lead to conclusions, the possibility of which has not hitherto been suggested by any court or law writer, and which, to say the least, would be astounding to the profession. For instance, if the act of 1885 becomes a part of every contract of service entered into since its passage, just "as if such law were in so many words expressly included in the contract as a part thereof," as counsel insist it did, so as to make the liability of the master to pay damages for injuries to a fellow servant of his negligent employé a contractual obligation, no reason can be conceived why the law existing in this regard prior to the passage of that act did not become in like manner a part of every contract of service then entered into, so that every such contract would be deemed to contain stipulations for the nonliability of the master for injuries flowing from the negligence of a fellow servant, and confining the injured servant's right to damages to a claim against his negligent fellow servant; the former, in other words, agreeing to look alone to the latter. There were many thousands of such contracts existing in this country and England at the time when statutes similar to section 2590 of our Code were enacted. There were, indeed, many thousands of such contracts existing in Alabama when that section became the law of this state. Each of these contracts, if the position of plaintiff as to our statute being embodied into the terms of his contract, so that its duties were contractual duties and its liabilities contractual obligations to pay money, can be maintained, involved the assurances of organic provisions, state and federal, of the continued nonliability of the master for the negligence

of his servants, notwithstanding the passage of such statutes. Yet these statutes were passed, and they have been applied to servants under pre-existing contracts as fully as to servants under subsequent contracts, and there has never been a suggestion even, in any part of the common-law world, that they were not rightly so applied. If plaintiff's contention is well taken, many a judgment has gone on the rolls in this state and throughout the country, and been satisfied, which palpably overrode vested rights, without the least suspicion on the part of court or counsel that one of the most familiar ordinances of the fundamental law was being violated. Nay, more: another result, not heretofore at all contemplated, would ensue. Contracts for service partly in Alabama might be now entered into in adjoining states, where the common-law rule still obtains, as in Mississippi, for instance, where the servant has no right to recover for the negligence of his fellow; and the assumption of this risk, under the law, becoming, according to the argument of counsel, a contractual obligation to bear it, such contracts would be good in Alabama; and, as to servants entering into them, our statute would have no operation, even upon negligence and resulting injury, within its terms, occurring wholly in Alabama. And, on the other hand, if this defendant is under a contractual obligation to pay the plaintiff the damages sustained by him because of the injury inflicted in Mississippi, the contract could be of course enforced in Mississippi, and damages there awarded by its courts, notwithstanding the law of that state provides that there can be no recovery, under any circumstances whatever, by one servant for the negligence of his fellow employé. We do not suppose that such a proposition ever has been or ever will be made in the courts of Mississippi. Yet that it should be made and sustained is the natural and necessary sequence of the position advanced in this case.

These considerations demonstrate the infirmity of plaintiff's position in this connection, and serve to show the necessity and propriety of the conclusion we propose to announce on this part of the case. That conclusion is that the duties and liabilities incident to the relation between the plaintiff and the defendant, which are involved in this case, are not imposed by, and do not rest in or spring from, the contract between the parties. The only office of the contract, under section 2590 of the Code, is the establishment of a relation between them,—that of master and servant; and it is upon that relation, that incident or consequence of the contract, and not upon the rights of the parties under the contract, that our statute operates. The law is not concerned with the contractual stipulations, except in so far as to determine from them that the relation upon which it is to operate exists. Finding this relation, the statute imposes certain duties and liabilities on the parties to it, wholly regardless of the stipulations of the contract as to the rights of the parties under it, and, it may be in the teeth of such stipulations. It is the purpose of the statute, and must be the limit of its operation, to govern persons standing in

the relation of master and servants to each other, in respect of their conduct in certain particulars within the state of Alabama. Mississippi has the same right to establish governmental rules for such persons within her borders as Alabama, and she has established rules which are different from those of our law; and the conduct of such persons towards each other is, when its legality is brought in question, to be adjudged by the rules of the one or the other states as it falls territorially within the one or the other. The doctrine is like that which prevails in respect of other relations, as that of man and wife. Marriage is a contract. The entering into this contract raises up certain duties and imposes certain liabilities in all civilized countries. What these duties and liabilities are at the place of the contract are determinable by the law of that place; but, when the parties go into other jurisdictions, the relation created by the contract under the law of the place of its execution will be recognized, but the personal duties, obligations, and liabilities incident to the relation are such as exist under the law of the jurisdiction in which an act is done or omitted, as to the legality, effect, or consequence of which the question arises. It might as well be said, where there is a marriage in Alabama, and the parties remove to Mississippi, and the wife there makes a contract which is void in Mississippi, but valid under our statute, and subsequently they return to Alabama, that our courts will enforce that contract; or if such husband, while in Mississippi, does an act which is innocuous and lawful in that state, but which, if done here, would entail liability upon him, and the parties afterwards return here, that the liability imposed by our laws could be enforced here, because the parties entered into the contract here,—as that a master is liable here for conduct towards his servant which was proper, or at least involved no liability, where it took place, simply because the contract which created the relation was entered into in this state. The whole argument is at fault. The only true doctrine is that each sovereignty, state or nation, has the exclusive power to finally determine and declare what act or omissions in the conduct of one to another—whether they be strangers, or sustain relations to each other which the law recognizes, as parent and child, husband and wife, master and servants, and the like—shall impose a liability in damages for the consequent injury, and the courts of no other sovereignty can impute a damnifying quality to an act or omission which afforded no cause of action where it transpired. * * * [The learned Justice here commented upon Whitford v. Panama R. Co., 23 N. Y. 465, and Gray v. Jackson, 51 N. H. 9, 12 Am. Rep. 1.]

For the error in refusing to instruct the jury to find for the defendant, if they believed the evidence, the judgment is reversed, and the cause will be remanded.[77]

McClellan states the law correctly.

[77]The locus delicti is where the damage is done or the injury is received, and not where the death ensues. Van Doren v. Pennsylvania R. Co., 93 Fed.

DENNICK v. CENTRAL R. CO. OF NEW JERSEY.

(Supreme Court of the United States, 1880. 103 U. S. 11, 26 L. Ed. 439.)

Error to the Circuit Court of the United States for the Northern District of New York.

MILLER, J.[78] It is understood that the decision of the court below rested solely upon the proposition that the liability in a civil action for damages which, under the statute of New Jersey, is imposed upon a party, by whose wrongful act, neglect, or default death ensues, can be enforced by no one but an administrator, or other personal representative of the deceased, appointed by the authority of that State. And the soundness or unsoundness of this proposition is what we are called upon to decide.

It must be taken as established by the record that the accident by which the plaintiff's husband came to his death occurred in New Jersey, under circumstances which brought the defendant within the provisions of the first section of the act making the company liable for damages, notwithstanding the death.

It can scarcely be contended that the act belongs to the class of criminal laws which can only be enforced by the courts of the State where the offence was committed, for it is, though a statutory remedy, a civil action to recover damages for a civil injury.

It is indeed a right dependent solely on the statute of the State; but when the act is done for which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, we cannot see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance, as was the case here.

It is difficult to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the question whether it is a statutory right or a common-law right.

Wherever, by either the common law or the statute law of a State, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court

260, 35 C. C. A. 282 (1899). But see Hoodmacher v. Lehigh Valley R. Co., 218 Pa. 21, 66 Atl. 975 (1907). Nor where the act which occasioned such injury or damage takes place. Cameron v. Vandergriff, 53 Ark. 381, 13 S. W. 1092 (1890); Alabama Great Southern R. Co. v. Carroll, 97 Ala. 126, 11 South. 803, 18 L. R. A. 433, 38 Am. St. Rep. 163 (1892). See Leonard v. Decker (D. C.) 22 Fed. 741 (1884).

In Germany it has been held that where the resulting injury occurs in a state other than the one where the act was committed, an action will lie if it is a tort under the law of either state. R. G., Dec. 22, 1902 (13 Niemeyer, 171). See, also, R. G., Nov. 8, 1906 (18 Niemeyer, 159).

[78] The statement of facts has been omitted.

which has jurisdiction of such matters and can obtain jurisdiction of the parties.

The action in the present case is in the nature of trespass to the person, always held to be transitory, and the venue immaterial. The local court in New York and the Circuit Court of the United States for the Northern District were competent to try such a case when the parties were properly before it. Mostyn v. Fabrigas, 1 Cowp. 161; Rafael v. Verelst, 2 W. Bl. 983, 1055; McKenna v. Fisk, 1 How. 241, 11 L. Ed. 117. We do not see how the fact that it was a statutory right can vary the principle. A party legally liable in New Jersey cannot escape that liability by going to New York. If the liability to pay money was fixed by the law of the State where the transaction occurred, is it to be said it can be enforced nowhere else because it depended upon statute law and not upon common law? It would be a very dangerous doctrine to establish, that in all cases where the several States have substituted the statute for the common law, the liability can be enforced in no other State but that where the statute was enacted and the transaction occurred. The common law never prevailed in Louisiana, and the rights and remedies of her citizens depend upon her civil code. Can these rights be enforced or the wrongs of her citizens be redressed in no other State of the Union? The contrary has been held in many cases. See Ex parte Van Riper, 20 Wend. (N. Y.) 614; Lowry v. Inman, 46 N. Y. 119; Pickering v. Fisk, 6 Vt. 102; Nashville & C. R. v. Sprayberry, 8 Baxt. (Tenn.) 341, 35 Am. Rep. 705; Great Western Ry. Co. v. Miller, 19 Mich. 305.

But it is said that, conceding that the statute of the State of New Jersey established the liability of the defendant and gave a remedy, the right of action is limited to a personal representative appointed in that State and amenable to its jurisdiction.

The statute does not say this in terms. "Every such action shall be brought by and in the names of the personal representatives of such deceased person." It may be admitted that for the purpose of this case the words "personal representatives" mean the administrator.

The plaintiff is, then, the only personal representative of the deceased in existence, and the construction thus given the statute is, that such a suit shall not be brought by her. This is in direct contradiction of the words of the statute. The advocates of this view interpolate into the statute what is not there, by holding that the personal representative must be one residing in the State or appointed by its authority. The statute says the amount recovered shall be for the exclusive benefit of the widow and next of kin. Why not add here, also, by construction, "if they reside in the State of New Jersey"?

It is obvious that nothing in the language of the statute requires such a construction. Indeed, by inference, it is opposed to it. The first section makes the liability of the corporation or person absolute

where the death arises from their negligence. Who shall say that it depends on the appointment of an administrator within the State?

The second section relates to the remedy, and declares who shall receive the damages when recovered. These are the widow and next of kin. Thus far the statute declares under what circumstances a defendant shall be liable for damages, and to whom they shall be paid. In this there is no ambiguity. But fearing that there might be a question as to the proper person to sue, the act removes any doubt by designating the personal representative. The plaintiff here is that representative. Why can she not sustain the action? Let it be remembered that this is not a case of an administrator, appointed in one State, suing in that character in the courts of another State, without any authority from the latter. It is the general rule that this cannot be done.

The suit here was brought by the administratrix in a court of the State which had appointed her, and of course no such objection could be made.

If, then, the defendant was liable to be sued in the courts of the State of New York on this cause of action, and the suit could only be brought by such personal representative of the deceased, and if the plaintiff is the personal representative, whom the courts of that State are bound to recognize, on what principle can her right to maintain the action be denied?

So far as any reason has been given for such a proposition, it seems to be this: that the foreign administrator is not responsible to the courts of New Jersey, and cannot be compelled to distribute the amount received in accordance with the New Jersey statute.

But the courts of New York are as capable of enforcing the rights of the widow and next of kin as the courts of New Jersey. And as the court which renders the judgment for damages in favor of the administratrix can only do so by virtue of the New Jersey statute, so any court having control of her can compel distribution of the amount received in the manner prescribed by that statute.

Again: it is said that, by virtue of her appointment in New York, the administratrix can only act upon or administer that which was of the estate of the deceased in his lifetime. There can be no doubt that much that comes to the hands of administrators or executors must go directly to heirs or devisees, and is not subject to sale or distribution in any other mode, such as specific property devised to individuals, or the amount which by the legislation of most of the States is set apart to the family of the deceased, all of which can be enforced in the courts; and no reason is perceived why the specific direction of the law on this subject may not invest the administrator with the right to receive or recover by suit, and impose on him the duty of distributing under that law. There can be no doubt that an administrator, clothed with the apparent right to receive or recover by suit property or money, may be compelled to deliver or pay it over to some one who establishes a

better right thereto, or that what he so recovers is held in trust for some one not claiming under him or under the will. And so here. The statute of New Jersey says the personal representative shall recover, and the recovery shall be for the benefit of the widow and next of kin. It would be a reproach to the laws of New York to say that when the money recovered in such an action as this came to the hands of the administratrix, her courts could not compel distribution as the law directs.

It is to be said, however, that a statute of New York, just like the New Jersey law, provides for bringing the action by the personal representative, and for distribution to the same parties, and that an administrator appointed under the law of that State would be held to have recovered to the same uses, and subject to the remedies in his fiduciary character which both statutes prescribe.

We are aware that Woodard v. Michigan S. & N. I. R. Co., 10 Ohio St. 121, asserts a different doctrine, and that it has been followed by Richardson v. New York Cent. R. Co., 98 Mass. 85,[79] and McCarthy v. Chicago, R. I. & P. R. Co., 18 Kan. 46, 26 Am. Rep. 742. The reasons which support that view we have endeavored to show are not sound. These cases are opposed by the latest decision on the subject in the Court of Appeals of New York, in the case of Leonard v. Columbia Steam Nav. Co., 84 N. Y. 48, 38 Am. Rep. 491, of which we have been furnished with a certified copy.

The right to recover for an injury to the person, resulting in death, is of very recent origin, and depends wholly upon statutes of the different States. The questions growing out of these statutes are new, and many of them unsettled. Each State court will construe its own statute on the subject, and differences are to be expected. In the absence of any controlling authority or general concurrence of decision, this court must decide for itself the question now for the first time presented to it, and with every respect for the courts which have held otherwise, we think that sound principle clearly authorizes the administrator in cases like this to maintain the action.

Judgment reversed, with directions to award a new trial.[80]

[79] But see Davis v. New York & N. E. R. Co., 143 Mass. 301, 9 N. E. 815, 58 Am. Rep. 138 (1887); Higgins v. Central N. E. & W. R. Co., 155 Mass. 176, 29 N. E. 534, 31 Am. St. Rep. 544 (1892).

[80] A personal representative appointed in the state in which the deceased had his domicile may sue in the jurisdiction where he was appointed. Leonard v. Columbia Steam Nav. Co., 84 N. Y. 48, 38 Am. Rep. 491 (1881); Nelson v. Chesapeake & O. R. Co., 88 Va. 971, 14 S. E. 838, 15 L. R. A. 583 (1892). Contra: Woodard v. Michigan S. & N. R. Co., 10 Ohio St. 121 (1859). A personal representative appointed in another jurisdiction has been permitted to sue without reappointment on the ground that he sued as trustee for the beneficiaries named in the statute. Boulden v. Pennsylvania R. Co., 205 Pa. 264, 54 Atl. 906 (1903); Connor v. New York, N. H. & H. R. Co. (R. I.) 68 Atl. 481 (1908). Contra: Southwestern R. Co. v. Paulk, 24 Ga. 356 (1858).

As to whether an administrator may be appointed by the courts of the state in which the cause of action arose if the deceased left no other property in the state, see Jordan v. Chicago & N. W. R. Co., 1 L. R. A. (N. S.) 885 (1905), and note. See, also, Cooper v. Gulf, C. & S. F. R. Co., 93 S. W. 201 (1906).

POWELL v. GREAT NORTHERN R. CO.

(Supreme Court of Minnesota, 1907. 102 Minn. 448, 113 N. W. 1017.)

START, C. J. Albert D. Powell, a brakeman employed by the defendant, a Minnesota corporation, was killed in the state of North Dakota, while acting as such, by the admitted negligence of other employés of the defendant, for which it is liable under the fellow servant statute of that state. This action was brought in the district court of the county of Ramsey, in this state, by the widow of the deceased, to recover damages for such negligence by virtue of a statute of North Dakota hereinafter referred to. She obtained a verdict for $11,000, and defendant appealed from an order denying its motion for a new trial.

The statute of North Dakota (found in the Revised Codes) is in these words:

"Sec. 5974. Whenever the death of a person shall be caused by a wrongful act, neglect or default and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case, the person who, or the corporation or company which, would have been liable if death had not ensued, shall be liable in an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"Sec. 5975. In such actions the jury shall give such damages as they think proportionate to the injury resulting from the death to the persons entitled to the recovery.

"Sec. 5976. The action shall be brought by the following persons in the order named: First. The surviving husband and wife. Second. The surviving children, if any. Third. The personal representative.

"Sec. 5977. The amount recovered shall not be liable for the debts of the decedent, but shall inure to the exclusive benefit to his heirs at law, in such shares as the judge before whom the case is tried shall fix in the order for judgment, and for the purpose of determining such shares the judge may after the trial make any investigation which he deems necessary."

It is conceded that upon the death of plaintiff's husband a cause of action at once accrued to her in North Dakota by virtue of this statute, but it is contended that the statute is so dissimilar to our own on the same subject that her right of action ought not to be enforced in our courts. This is substantially the only question raised by the record. A right of action accruing to a party under a statute of another state will, as a matter of comity, be enforced in the courts of this state, when jurisdiction can be had and justice done between the parties, if such statute be not contrary to the public policy of this state; that is, against good morals, or natural justice, or the interest

of this state or its citizens. Herrick v. Minneapolis & St. L. Ry. Co., 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771; Midland Co. v. Broat, 50 Minn. 562, 52 N. W. 972, 17 L. R. A. 312; Nicholas v. Burlington, C. R. & N. Ry. Co., 78 Minn. 43, 80 N. W. 776; Negaubauer v. Great Northern Ry. Co., 92 Minn. 184, 99 N. W. 620, 104 Am. St. Rep. 674; Stewart v. Baltimore & O. R. Co., 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537; Rick v. Saginaw Bay Towing Co., 132 Mich. 237, 93 N. W. 632, 102 Am. St. Rep. 422. The statute of another state is not contrary to the public policy of this state simply because it is materially unlike our own, nor is it so even if we have no statute on the same subject that it covers. In the Herrick Case a right of action, given by a statute of the state of Iowa to an employé of a railway company against it for the recovery of damages for injuries sustained by him by reason of the negligence of a fellow servant, was enforced in the courts of this state, although at the time the law of this state was the common law, which denied a servant any relief from his master for the negligence of his fellow servant. Nor is it any reason for refusing to enforce a right of action given by the statute of another state that it is given to a different person or party than it is by our own statute. This was expressly held in the Nicholas Case. The claims of the defendant must be tested by the rules we have stated.

Its first claim is, in effect, that the provision of the statute of North Dakota, which declares that the damages recovered shall inure to the exclusive benefit of the heirs at law of the deceased in such shares as the trial judge shall fix in the order for judgment, is so dissimilar to the provisions of our own statutes that the courts of this state cannot give it effect, and therefore they will not entertain the action. This cause of action accrued upon the death of the deceased in North Dakota, and the right of the plaintiff to enforce it was then absolute. The determination of the respective shares of the heirs by the trial judge is a mere incident to the entry of judgment after the liability of the defendant and the amount thereof have been determined by the verdict. Such determination after the trial in no manner affects or interests the defendant. The court can do full justice between the parties to the action, whether or not it fixes in the judgment the amount which shall inure to the benefit of each heir. In any event, the judgment must be entered in favor of the plaintiff and against the defendant for the amount of the verdict. When the defendant pays to the plaintiff the amount of the judgment its liability is absolutely extinguished, and it has no more concern as to the preservation or distribution of the fund than the defendant, in an action under our statute to recover by a father for injuries to his minor child, has in the determination by the court of the question whether the plaintiff shall give security before the amount of the judgment is paid to him. Lathrop v. Schutte, 61 Minn. 196, 63 N. W. 493. It is quite obvious that the provisions of the statute of North Dakota as to the determination of the respective shares of the heirs in the amount recovered is

a mere incident to the entry of judgment, with which the courts of this state will comply, and that it is not contrary to good morals, or natural justice, or the interest of the state or its citizens.

The defendant further claims that it is against the public policy of this state to allow the recovery of more than $5,000 damages, the limit in our statute, for the death of a person by the wrongful act or neglect of another. This question is settled adversely to the defendant by the Herrick Case, for in that case nothing whatever could have been recovered under the laws of this state, and yet the statute of Iowa, giving what our laws then wholly denied, was enforced. The greater includes the less. In the Negaubauer Case the time limit for bringing the action in the statute of Montana, although greater than that in our own statute, was given effect. We hold that the fact that the amount of the recovery in actions of this kind is limited by our statute, but not by the statute of North Dakota, affords no reason why the courts of this state should not enforce in its entirety the right of action given by the statute of North Dakota.

The last contention of the defendant's counsel is that the trial court erred in refusing to permit him to discuss our own statute as to damages. The ruling was manifestly right, for the statute of the forum had nothing to do with the damages.

Order affirmed.[81]

SLATER v. MEXICAN NAT. R. CO.

(Supreme Court of the United States, 1904. 194 U. S. 120, 24 Sup. Ct. 581, 48 L. Ed. 900.)

HOLMES, J.[82] This is an action brought in the United States circuit court for the northern district of Texas by citizens and residents of Texas against a Colorado corporation operating a railroad from Texas to the City of Mexico. The plaintiffs are the widow and children of William H. Slater, who was employed by the defendant as a switchman on its road, and was killed through the defendant's negligence while coupling two freight cars at Nuevo Laredo, in Mexico. This action is to recover damages for the death. The laws of Mexico were set forth in the plaintiffs' petition, and the defendant demurred

[81] The lex loci delicti will determine the amount of damages. Northern Pac. R. Co. v. Babcock, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. Ed. 958 (1894), semble. But see Wooden v. Western N. Y. & P. R. Co., 126 N. Y. 10, 26 N. E. 1050, 13 L. R. A. 458, 22 Am. St. Rep. 803 (1891). And the distribution of the moneys so recovered. In re Coe's Estate, 130 Iowa, 307, 106 N. W. 743, 4 L. R. A. (N. S.) 814, 114 Am. St. Rep. 416 (1906); Charlton v. St. Louis & S. F. R. Co., 200 Mo. 413, 98 S. W. 529 (1906). Compare In re Williams' Estate, 130 Iowa, 553, 107 N. W. 608 (1906).

The lex domicilii of the tort-feasor, and not the lex loci delicti, has been held to govern the question whether the action will survive against his estate. Whitten v. Bennett (C. C.) 77 Fed. 271 (1896).

[82] A part of the opinion has been omitted.

on the ground that the cause of action given by the Mexican laws was not transitory, for reasons sufficiently stated. The demurrer was overruled, and the defendant excepted. A similar objection was taken also by plea setting forth additional sections of the Mexican statutes. A demurrer to this plea was sustained, subject to exception. The same point was raised again at the trial by a request to direct a verdict for the defendant. The judge who tried the case instructed the jury that the damages to be recovered, if any, were to be measured by the money value of the life of the deceased to the widow and children, and the jury returned a verdict for a lump sum, apportioned to the several plaintiffs. The judge and jury in this regard acted as prescribed by the Texas Rev. Stat. art. 3027. The case then was taken to the circuit court of appeals, where the judgment was reversed and the action ordered to be dismissed. Mexican Nat. R. Co. v. Slater, 53 C. C. A. 239, 115 Fed. 593.

There is no need to encumber the reports with all the statutes in the record. The main reliance of the plaintiffs is upon the following agreed translation from the Penal Code, bk. 2. "Civil Liability in Criminal Matters." "Art. 301. The civil liability arising from an act or omission contrary to a penal law consists in the obligation imposed on the party liable, to make (1) restitution, (2) reparation, (3) indemnization, and (4) payment of judicial expenses."

"Art. 304. Reparation comprehends: Payment of all damages caused to the injured party, his family, or a third person for the violation of a right which is formal, existing, and not simply possible, if such damages are actual, and arise directly and immediately from the act or omission complained of, or there be a certainty that such act or omission must necessarily cause a proximate and inevitable consequence." Coupled with these are articles making railroad companies answerable for the negligence of their servants within the scope of the servants' employment. Penal Code, bk. 2, arts. 330, 331; regulations for the construction, maintenance, and operation of railroads, art. 184. We assume for the moment that it was sufficiently alleged and proved that the killing of Slater was a negligent crime within the definition of article 11 of the Penal Code, and, therefore, if the above sections were the only law bearing on the matter, that they created a civil liability to make reparation to any one whose rights were infringed.

As Texas has statutes which give an action for wrongfully causing death, of course there is no general objection of policy to enforcing such a liability there, although it arose in another jurisdiction. Stewart v. Baltimore & O. R. Co., 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537. But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the lex fori, with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside its own

territory. The theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an obligatio, which like other obligations, follows the person, and may be enforced wherever the person may be found. Stout v. Wood, 1 Blackf. (Ind.) 71; Dennick v. Central R. Co., 103 U. S. 11, 18, 26 L. Ed. 439, 442. But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation (Smith v. Condry, 1 How. 28, 11 L. Ed. 35), but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose. In Northern Pac. R. Co. v. Babcock, 154 U. S. 190, 199, 14 Sup. Ct. 978, 38 L. Ed. 958, 961, an action was brought in the district of Minnesota for a death caused in Montana, and it was held that the damages were to be assessed in accordance with the Montana statute. Therefore we may lay on one side as quite inadmissible the notion that the law of the place of the act may be resorted to so far as to show that the act was a tort, and then may be abandoned, leaving the consequences to be determined according to the accident of the place where the defendant may happen to be caught. See further, Pullman Palace Car Co. v. Lawrence, 74 Miss. 782, 801, 802, 22 South. 53; Morris v. Chicago, R. I. & P. R. Co., 65 Iowa, 727, 731, 23 N. W. 143, 54 Am. Rep. 39; Mexican Nat. Ry. Co. v. Jackson, 89 Tex. 107, 33 S. W. 857, 31 L. R. A. 276, 59 Am. St. Rep. 28; Bruce's Adm'r v. Cincinnati R. Co., 83 Ky. 174, 181; Holmes v. Barclay, 4 La. Ann. 64; Atwood v. Walker, 179 Mass. 514, 519, 61 N. E. 58; Minor, Confl. L. 493, § 200. We are aware that expressions of a different tendency may be found in some English cases. But they do not cover the question before this court, and our opinion is based upon the express adjudication of this court, and, as it seems to us, upon the only theory by which actions fairly can be allowed to be maintained for foreign torts. As the cause of action relied upon is one which is supposed to have arisen in Mexico, under Mexican laws, the place of the death and the domicile of the parties have no bearing upon the case.

The application of these considerations now is to be shown. The general ground on which the plaintiffs bring their suit is, as we have stated, that there is a civil liability imposed on the railroad company arising from an act contrary to the penal law,—a negligent crime, as it is called in the Code. But the Code contains specific provisions for the case of homicide. These necessarily override the merely general rule for torts which also are crimes. Mutual Life Ins. Co. v. Hill, 193 U. S. 551, 24 Sup. Ct. 538, 48 L. Ed. 788. By article 311 the right is personal to the parties mentioned in art. 318, and is no part of the estate of the deceased. The specific cause of action is the killing of the deceased. So far as appears, apart from that and the following articles, these plaintiffs would have no right of action for the

cause alleged. For article 304 seems to presuppose a right in the family, not to create one, and we cannot assume a general right of the members of a family to sue for causing death. By article 318 civil responsibility for a wrongful homicide includes, besides the expenses of medical attendance and burial and damages to the property of the deceased, the expenses "of the support not only of the widow, descendants and ascendants of the deceased, who were being supported by him, he being under legal obligations to do so, but also to the posthumous descendants that he may leave." Then, by article 319, the obligation to support shall last during the time that the deceased might have lived, calculated by a given life table, but taking the state of his health before the homicide into consideration; but "the obligation shall cease: 1. At whatever time it shall not be absolutely necessary for the subsistence of those entitled to receive it. 2. When those beneficiaries get married. 3. When the minor children become of age. 4. In any other case in which, according to law, the deceased, if alive, would not be required to continue the support." It is unnecessary to set forth the detailed provisions as to support in other parts of the statutes. It is sufficiently obvious from what has been quoted that the decree contemplated by the Mexican law is a decree analogous to a decree for alimony in divorce proceedings,—a decree which contemplates periodical payments, and which is subject to modification from time to time, as the circumstances change. See also, arts. 1376, 1377, of the Code of Procedure, and Penal Code, bk. 2, art. 363.

The present action is a suit at common law, and the court has no power to make a decree of this kind contemplated by the Mexican statutes. What the circuit court did was to disregard the principles of the Mexican statute altogether and to follow the Texas statute. This clearly was wrong, and was excepted to specifically. But we are of opinion further that justice to the defendant would not permit the substitution of a lump sum, however estimated, for the periodical payments which the Mexican statute required. The marriage of beneficiaries, the cessation of the absolute necessity for the payments, the arising of other circumstances in which, according to law, the deceased would not have been required to continue the support, all are contingencies the chance of which cannot be estimated by any table of probabilities. It would be going far to give a lump sum in place of an annuity for life, the probable value of which could be fixed by averages based on statistics. But to reduce liability conditioned as this was to a lump sum would be to leave the whole matter to a mere guess. We may add that by art. 225, concerning alimony, the right cannot be renounced, nor can it be subject to compromise between the parties. There seems to be no possibility in Mexico of capitalizing the liability. Evidently the Texas courts would deem the dissimilarities between the local law and that of Mexico too great to permit an action in the Texas state courts. Mexican Nat. Ry. Co. v. Jackson, 89 Tex. 107, 33 S. W. 857, 31 L. R. A. 276, 59 Am. St. Rep. 28;

St. Louis, I. M. & S. R. Co. v. McCormick, 71 Tex. 660, 9 S. W. 540, 1 L. R. A. 804. The case is not one demanding extreme measures, like those where a tort is committed in an uncivilized country. The defendant always can be found in Mexico, on the other side of the river, and it is to be presumed that the courts there are open to the plaintiffs, if the statute conferred a right upon them notwithstanding their absence from the jurisdiction, as we assume that it did, for the purposes of this part of the case. See Mulhall v. Fallon, 176 Mass. 266, 57 N. E. 386, 54 L. R. A. 934, 79 Am. St. Rep. 309.[83] * * *

SOUTHERN PAC. CO. v. DUSABLON.

(Court of Civil Appeals of Texas, 1908. 106 S. W. 766.)

NEILL, J.[84] This suit was brought by the appellee against appellant to recover damages for personal injuries alleged to have been inflicted by the negligence of the company on the 26th of April, 1906, at Lordsburg, N. M. In our view of the case it is unnecessary to state the grounds of negligence averred, nor the specific injuries sustained. The appellant answered by a plea of privilege, claiming the right to be sued in Harris county, Tex. Also by special demurrer, raising the question of jurisdiction, which being overruled, it filed a special plea to the jurisdiction of the court, predicating such plea upon the statute set out in our conclusions of law, and upon the fact that appellee was a resident citizen of New Mexico at the time of his alleged injuries and when this suit was brought. This plea being overruled, appellant pleaded certain defenses in bar, which, in view of the disposition we shall make of the case, are not necessary to further mention. The trial of the case resulted in a verdict and judgment for the appellee. * * *

It is a general rule that for the purpose of redress it is immaterial where a wrong was committed; in other words, a wrong being personal, redress may be sought for it whenever the wrongdoer may be found. To this there are a few exceptions, in which actions are said to be local, and must therefore be brought within the country where they arose. As applied to torts, these exceptions may be said to consist of: (1) Those where the lex loci delicti is in direct contravention of the law or policy of the forum; (2) where the remedy prescribed for the tort by the lex loci delicti is penal in its character;

[83] Fuller, C. J., with whom concurred Harlan and Peckham, JJ., dissented. In his dissenting opinion the learned Chief Justice said: "It seems to me that the method of arriving at and distributing the damages pertains to the procedure or remedy—that is to say, to the course of the court after parties are brought in, and the means of redressing the wrong—and I think the general rule that procedure and remedy are regulated by the law of the forum is applicable." Page 132. See 4 Col. Law Rev. 503.

[84] A part of the opinion has been omitted.

and (3) statutory torts, where the statute, in creating the liability, at the same time, creates a mode of redress peculiar to that state, by which alone the wrong is to be remedied. To these exceptions, however, there are certain limitations and qualifications not necessary to mention here. It is obvious that the second exception has no application to this case. But it was earnestly contended by counsel for appellant in brief and oral argument that the first has; and among other cases they cite Mexican Nat. Ry. Co. v. Jackson, 89 Tex. 113, 33 S. W. 857, 31 L. R. A. 276, 59 Am. St. Rep. 28, in support of the contention. * * *

The Jackson Case was decided upon the ground that the remedy given by the law of Mexico for such an injury is so essentially different from that given by our law that it cannot be enforced by the courts of Texas. Something is said, arguendo, in the opinion as to public policy of Mexico, a matter about which the courts of this state are not concerned, and is never considered in determining the public policy of the forum. It is the public policy of its own country that a court must look to and be governed by in deciding whether it will entertain jurisdiction of a cause of action arising elsewhere, and not to the policy of a foreign country, about which they know and care nothing. In view of what has always been the pronunciation of our courts on cases of this character, we do not think it was the intention of the Supreme Court to hold that jurisdiction should be denied because they would be "charge upon our people" in making settlement of rights originating outside the state, under the laws of a different government. See Mexican Cent. Ry. Co. v. Mitten, 13 Tex. Civ. App. 653, 36 S. W. 282. But, however this may be, the territory of New Mexico does not occupy the attitude towards Texas of strictly a foreign country. Among the privileges guaranteed by article 4, § 3, of the Constitution of the United States to the citizens of each state, is the right to institute and maintain actions of every kind that is accorded its own citizens. Corfield v. Coryell, 4 Wash. C. C. 380, Fed. Cas. No. 3,230. Under the third section of article 4 of the Constitution it has been held that a "citizen of a sister state may sue a defendant resident of his home state in any state where he can get service on him, even though the cause of action arose in his home state, provided it be transitory." Eingartner v. Illinois Steel Co., 94 Wis. 70, 68 N. W. 664, 34 L. R. A. 503, 59 Am. St. Rep. 859; Cofrode v. Gartner, 79 Mich. 332, 44 N. W. 623, 7 L. R. A. 511. While it may be that this privilege is not extended to citizens of territories, and may be claimed only by citizens of sister states, yet a territory like New Mexico, waiting to be panoplied with statehood, is a child of the federal government to whom comity, at least, should, in its infancy, be extended by one of the United States. We therefore conclude that this case does not fall within the first exception stated to the general rule that, for the purpose of redress, it is immaterial where the wrong is committed.

Does it fall within the third exception? This question depends upon (1) whether plaintiff's action is founded upon a statutory tort, and (2), if it is, whether the statute, in creating the liability, at the same time creates a mode of redress peculiar to the territory of New Mexico. The act of the Legislature (Laws 1903, p. 51, c. 33) upon which the appellant bases its contention that this action is for purely a statutory tort is as follows:

"Whereas it has become customary for persons claiming damages for personal injuries received in this territory to institute and maintain suits for the recovery thereof in other states and territories, to the increased cost and annoyance and manifest injury and oppression of the business interests of this territory, and in derogation of the dignity of the courts thereof; therefore be it enacted by the Legislative Assembly of the territory of New Mexico:

"Section 1. Hereafter there shall be no civil liability under either the common law or any statute of this territory on the part of any person or corporation for any personal injuries inflicted, or death caused by such person or corporation in this territory, unless the person claiming damages therefor, shall, within ninety days after such injury shall have been inflicted, make and serve upon the person or corporation against whom the same is claimed and at least thirty days before commencing suit to recover judgment therefor, an affidavit which shall be made before some officer within this territory who is authorized to administer oaths, in which the affiant shall state his name and address, the name of the person receiving such injuries, in so far as the same may be known to affiant, the way or manner in which said injuries were caused in so far as the affiant has any knowledge thereof, and the names and addresses of all witnesses to the happening of the facts or any part thereof causing such injuries as may at such times be known to affiant, and unless the person so claiming such damages shall also commence an action to recover the same within one year after such injuries occur in the district court of this territory in and for the county in which such injuries occur, or in and for the county of this territory where the claimant or person against whom such claim is asserted resides, or in event such claim is asserted against a corporation, in the county in this territory where such corporation has its principal place of business; and said suit after having been commenced shall not be dismissed by plaintiff unless by written consent of defendant filed in the case or for good cause shown to the court; it being hereby expressly provided and understood that such right of action is given only on the understanding that the foregoing conditions precedent are made a part of the law under which right to recover can exist for such injuries except as herein otherwise provided."

"Sec. 3. It shall be unlawful for any person to institute, carry on or maintain any suit for the recovery of any such damages in any other state or territory."

It clearly appears from this act that the Legislature intended to make any right of action against any person or corporation for personal injuries or death inflicted in New Mexico depend upon the person claiming damages bringing and prosecuting his suit therefor in a district court of the territory, after performing certain acts made conditions precedent to his cause of action. In other words, its obvious purpose was to relieve the perpetrator of the wrong from any civil liability therefor, unless the party damaged, after complying with certain conditions prescribed, instituted his suit within one year after the injuries occurred in the district court of the territory where they were inflicted, or in the county where both parties reside, or, if against a corporation, in the county of the territory where such corporation has its principal place of business. It will, however, be observed that the statute does not create or originate the cause of action, but seems to recognize the fact that civil liability theretofore existed at common law, as well as by statute, for personal injuries inflicted or death caused by persons or corporations in New Mexico. This differentiates this case from Ross v. Kansas City S. Ry. Co., 34 Tex. Civ. App. 586, 79 S. W. 626, and others which hold that, where a cause of action is created by and has its origin in a statute which imposes conditions or limitations upon the right as prerequisites to its exercise, this is a right of action existing at common law, which has not, as in the case of Coyne v. Southern Pacific Co. (C. C.) 155 Fed. 683, been wholly superseded by the statute, upon which conditions are sought to be imposed by statute limiting its enforcement. As was said by this court in Atchison, T. & S. F. Ry. Co. v. Sowers (Tex. Civ. App.) 99 S. W. 190, a case where the same statute was considered, and precisely like this one, except the plaintiff was a citizen of the territory of Arizona: "The section of the law under consideration * * * attempts not only to prohibit its citizens, but all parties, who are so unfortunate as to be injured within its territorial limits, from exercising the right, accorded in England, the states of the American Union, and other civilized countries, of instituting such actions, wherever the guilty party may have his or its domicile." The judgment in favor of plaintiff in that case was affirmed, and an application by the defendant for a writ of error was denied by the Supreme Court. This is, in so far as it can be decided by the courts of state, a judicial determination that this action is not a statutory one, in the sense that it can only be prosecuted and maintained in the state where the injury was inflicted, unless the injured party be a citizen of that state. But, inasmuch as the plaintiff in this case was at the time his cause of action accrued, and when this suit was brought, a resident citizen of the territory of New Mexico, the further question is presented: Can this action, in view of the statute under consideration, be maintained by him in any jurisdiction except that territory? It cannot be said that a citizen is not to be governed and bound by the laws of his own country; nor can he, in disregard of such laws, go into the courts of another coun-

try and ask them as a matter of comity to redress wrongs which the laws of his domicile require him to seek redress in the courts of his own country. The very principle upon which comity between foreign or sister states is based repels the idea that he has even the shadow of a claim to any such right. As we said in the Sowers Case: "The right of injured parties to recover damages from the negligent inflictor of the injuries is recognized in New Mexico, although the recognition carries with it burdensome and vexatious conditions, of which, however, if its citizenship is willing to endure them, no one is in a position to complain." The honor one enjoys in being a resident of a territory whose Legislature has such an exalted idea of the "dignity" of its courts, and tender consideration for its "business interests," manifested by the statute in question, must be taken cum onere. We therefore conclude that the district court was without jurisdiction of this case, and that it erred in not sustaining defendant's exception and plea to its jurisdiction.

If we are correct in this conclusion, the other assignments of error should not be considered. If, however, the Supreme Court should differ from us upon the jurisdictional question, we will then cheerfully perform the duty of considering all other questions raised by the assignments.

For reason of the errors indicated, the judgment of the district court is reversed, and the suit dismissed, without prejudice of plaintiff's right, if any he has, to institute and prosecute his action in any jurisdiction outside the state of Texas.

Reversed and dismissed.[85]

[85] In Illinois it is provided by statute (Laws of 1903, p. 217) that no action shall be brought or prosecuted to recover damages for death occurring outside the state. The statute prohibits the bringing of an action in Illinois only where the act by which the death was caused occurred in another state. Crane v. Chicago & W. I. R. Co., 233 Ill. 259, 84 N. E. 222 (1908). And in Ohio the Supreme Court of the state reached the following conclusion: "From a consideration of the statutes hereinbefore referred to and the former decisions of this court, we think it must now be held to be the recognized policy and established law of this state that an action for wrongful death occurring in another state will not be enforced in the courts of this state, except where the person killed was, at the time of his death, a citizen of Ohio." Baltimore & O. R. Co. v. Chambers, 73 Ohio St. 16, 76 N. E. 91, 11 L. R. A. (N. S.) 1012 (1905); affirmed Chambers v. Baltimore & O. R. Co., 207 U. S. 142, 28 Sup. Ct. 34, 52 L. Ed. 143 (1907).

An action of trespass to realty is local, and cannot be maintained in any other jurisdiction. Doulson v. Matthews, 4 T. R. 503 (1792); British South Africa Co. v. Companhia de Mocambique, App. Cas. 602 (1893); Ellenwood v. Marietta Chair Co., 158 U. S. 105, 15 Sup. Ct. 771, 39 L. Ed. 913 (1895). Contra: Little v. Chicago, St. P., M. & O. R. Co., 65 Minn. 48, 67 N. W. 846, 33 L. R. A. 423, 60 Am. St. Rep. 421 (1896). See, in general, 22 Am. St. Rep. 22–27.

With respect to the infringement of foreign patents, see 19 Harv. L. Rev. 295; with respect to the infringement of foreign trade-marks, 21 Harv. L. Rev. 361; and as to foreign patents, copyrights, and trade-marks in general, v. Bar, Priv. Int. Law, 737–791; Meili, Int. Civ. & Com. Law, 450–453; Weiss, Traité de droit international privé, vol. 4, pp. 451–501.

CONTINENTAL LAW.—On principle, the lex loci governs. *France*, Cass. May

THE SCOTLAND.

(Supreme Court of the United States, 1881. 105 U. S. 24, 26 L. Ed. 1001.)

Appeals from the circuit court of the United States for the Eastern district of New York.

BRADLEY, J.[86] The steamship "Scotland," belonging to the National Steam Navigation Company, a corporation of Great Britain, sailed from New York for Liverpool, on the 1st of December, 1866, with freight and passengers; and after reaching the high sea, opposite Fire Island light, ran into the American ship "Kate Dyer," bound from Callao, in the republic of Peru, to New York, laden with a cargo of guano. The "Kate Dyer" immediately sank, and ship and cargo were totally lost. The steamship suffered so severely from the collision that she put back, but was unable to get further than the middle ground outside and south of Sandy Hook, where she also sank and became a total loss, with the exception of some stripping of ship's material, consisting of anchors, chains, rigging, and cabin furniture got from her by the Coast Wrecking Company before she went down. Libels in personam were filed in the district court for the Eastern district of New York, against the steam navigation company by the owners of the "Kate Dyer," the Peruvian government, owner of her cargo, and by a passenger and some of the crew who lost certain effects by the sinking of the ship. Personal service of process not being obtainable, the marshal attached another vessel belonging to the steamship company, lying in the port of New York, which was duly claimed and released on stipulation, and the steamship company appeared and responded to the libel. The answer admitted the collision, but denied that the "Scotland" was in fault, and further alleged as follows: "Respondents further answering say, that said steamer 'Scotland' was by said collision sunk and destroyed, and that there is no liability in personam against these respondents for said loss of the 'Kate Dyer.'" Proofs being taken, the district court rendered a decree in favor of the libellants, which, on appeal to the circuit court, was substantially affirmed. The owners of the "Kate Dyer" were awarded $56,000, with interest; the owners of the cargo, $57,375, with interest; and the passengers and crew, upwards of $11,000, with interest.

16, 1888 (S. 1891, 1, 509); App. Paris, June 23, 1899 (28 Clunet, 128). *Germany*, R. G. March 12, 1906 (Juristiche Wochenschrift, 1906, p. 297). So as to liability of principal for the torts of his agent, 19 R. G. 382 (Sept. 23, 1887); R. G. July 1, 1896 (6 Niemeyer, 514). It will not be applied where it would conflict with the rules concerning public order. *France*, Cass. May 29, 1894 (S. 1894, 1, 481), and note by Ch. Lyon-Caen. *Germany*, 29 R. G. 90 (June 25 and July 9, 1882). And according to article 12, Law Intr., no greater claim for a foreign wrongful act can be asserted in a German court against a German than is authorized by German law.

See P. Fiore, De la loi qui d'après les principes du droit international doit régir les engagements qui se forment sans convention. 27 Clunet, 449–460, 717–734.

[86]A part of the opinion has been omitted.

On the trial in the circuit court, the respondents, besides contesting the question of fault and general liability, again insisted upon the benefit of the limited liability law, and proposed for adoption by the court a certain finding of fact and conclusion of law looking to that end. The finding of fact was substantially adopted by the court as follows: "The steamer was, by reason of the said collision and in consequence thereof so injured that, although at once put about, she could only reach the 'outer middle,' so called, on the west side of the channel south of Sandy Hook, where she sank and became a total loss, except that a large amount of anchors, chains, rigging, and cabin furniture, of the value of several thousand dollars, was saved from her and delivered to the agent of the respondents. She earned no freight, the voyage being broken up. The passage-money paid in advance by the passengers was $1,703.65; of this $225 was refunded to such of them as could not wait to be transported by the respondents in another vessel of their line; the remaining passengers were forwarded by the 'Queen,' and the expense charged to the 'Scotland.' Irrespective of the carriage of the passengers by the 'Queen,' the respondents paid return money as above, $225, and the expenses of bringing the passengers to New York, and taking care of them before they were reshipped, $566.83, in all, $791.83; the balance of the passage-money, $911.82, was credited to the 'Queen,' and charged to the 'Scotland.'"

The conclusion of law proposed and insisted on by the respondents as legitimately arising upon this fact was as follows, to wit: "The liability of the respondents, as owners of the said steamship 'Scotland,' did not extend beyond the value of their interest in the vessel and her pending freight at the time of the collision; and the vessel having been lost by the collision, and no freight or passage-money earned, the respondents are thereby discharged from any liability on account thereof."

The circuit court, as before stated, refused any relief grounded on the limited liability law, but made a decree against the respondents for the total amount of damages sustained by the various parties in interest. To this conclusion the respondents excepted.

Both parties appealed from the decree, and the case is now before us for review. The appeal of the libellants was based on what they supposed to be an erroneous conclusion of the court in reference to the allowance of interest, and the estimation of the value of the cargo.

The principal question raised and argued on this appeal is, whether the steamship company is entitled to the benefit of a limited responsibility equal to the value of the steamship and freight after the collision occurred,—a liability which, in this case, as the vessel and freight were a total loss, would only amount to the value of the articles saved by the wrecking company. It is contended by the company that it is entitled to the benefit of such limitation, either under the general maritime law or under the act of congress of March 3, 1851, c. 43. On the other side, it is contended that the general maritime law on this

subject (if there be any) is not in force in this country, and that the benefit of the act of congress cannot be claimed by foreign vessels. It is further contended by the libellants that the steamship company, even if it might have had the benefit of the rule, failed to take the proper steps for obtaining it,—first, in not filing a petition according to the rules of this court; and, secondly, in not surrendering the property recovered from the wreck, or its proceeds.

In the case of Norwich & N. Y. Transp. Co. v. Wright, 13 Wall. 104, 20 L. Ed. 585, we had occasion to state that the general maritime law of Europe only charges innocent owners to the extent of their interest in the ship for the acts of the master and crew, and that if the ship is lost their liability is at an end. This rule is laid down in several places in the ancient code called the Consolato del Mare, and in many other authorities which are quoted and commented upon by Judge Ware in the case of The Rebecca, 1 Ware, 187, Fed. Cas. No. 11,619; and it is specifically formulated in various national ordinances and codes, amongst others, in the Marine Ordinance of Louis XIV., adopted in 1681. Emerigon, in his treatise of Contracts "a la Grosse," says: "The owners of the ship are bound in solidum by everything which the captain does in the course of the voyage for the promotion of the voyage. * * * But this action in solidum does not exist against the owners farther than according to the interest which they have in the body of the ship; hence, if the ship perish, or if they abandon their interest, they are no longer liable for anything. It is thus that the maritime laws of the Middle Age have directed; such is the law which is observed in the North; and such is the regulation of our own ordinance:" and he refers to the Consolato and other authorities. The text of the French ordinance, which is regarded as merely formulating the old customary law, is as follows: "The owners of ships are responsible for the acts of the master, but they become discharged therefrom by abandoning the ship and freight."

But whilst this is the rule of the general maritime law of Europe, it was not received as law in England nor in this country until made so by statute. The English statutes, indeed, have not yet adopted, to its full extent, the maritime law on this subject. They make the owners responsible to the value of ship and freight at the time of the injury (that is, immediately before the injury), although the ship be destroyed, or injured by the same act, or afterwards in the same voyage; whilst our law adopts the maritime rule of graduating the liability by the value of the ship after the injury, as she comes back into port, and the freight actually earned; and enables the owners to avoid all responsibility by giving up ship and freight, if still in existence, in whatever condition the ship may be; and, without such surrender, subjects them only to a responsibility equivalent to the value of the ship and freight as rescued from the disaster.

But, whilst the rule adopted by congress is the same as the rule of the general maritime law, its efficacy as a rule depends upon the

statute, and not upon any inherent force of the maritime law. As explained in The Lottawanna, 21 Wall. 558, 22 L. Ed. 654, the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country; and this particular rule of the maritime law had never been adopted in this country until it was enacted by statute. Therefore, whilst it is now a part of our maritime law, it is, nevertheless, statute law, and must be interpreted and administered as such. Then, does it govern the present case?

In administering justice between parties it is essential to know by what law, or code, or system of laws, their mutual rights are to be determined. When they arise in a particular country or state, they are generally to be determined by the laws of that state. Those laws pervade all transactions which take place where they prevail, and give them their color and legal effect. Hence, if a collision should occur in British waters, at least between British ships, and the injured party should seek relief in our courts, we would administer justice according to the British law, so far as the rights and liabilities of the parties were concerned, provided it were shown what that law was. If not shown, we would apply our own law to the case. In the French or Dutch tribunals they would do the same. But, if a collision occurs on the high seas, where the law of no particular state has exclusive force, but all are equal, any forum called upon to settle the rights of the parties would prima facie determine them by its own law as presumptively expressing the rules of justice; but if the contesting vessels belonged to the same foreign nation, the court would assume that they were subject to the law of their nation carried under their common flag, and would determine the controversy accordingly. If they belonged to different nations, having different laws, since it would be unjust to apply the laws of either to the exclusion of the other, the law of the forum, that is, the maritime law as received and practised therein, would properly furnish the rule of decision. In all other cases, each nation will also administer justice according to its own laws. And it will do this without respect of persons, to the stranger as well as to the citizen. If it be the legislative will that any particular privilege should be enjoyed by its own citizens alone, express provision will be made to that effect. Some laws, it is true, are necessarily special in their application to domestic ships, such as those relating to the forms of ownership, charter-party, and nationality; others follow the vessel wherever she goes, as the law of the flag, such as those which regulate the mutual relations of master and crew, and the power of the master to bind the ship or her owners. But the great mass of the laws are, or are intended to be, expressive of the rules of justice and right applicable alike to all.

The act of congress creating a limited responsibility of ship-owners in certain cases, first passed March 3, 1851, and reproduced in sections 4282–4289 of the Revised Statutes, is general in its terms, extending to all owners of vessels without distinction or discrimination.

It declares that "the liability of the owner of any vessel for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." This statute declares the rule which the law-making power of this country regards as most just to be applied in maritime cases. The great carrying trade by land is governed by substantially the same principle; being in the hands of corporate associations, whose members are not personally liable for acts of the employés, but risk only the amount of their capital stock in the corporation. The doctrine of respondeat superior, it is true, applies to the corporations themselves; but that does not interfere with the personal immunity of the shareholders. Whenever the public interest requires the employment of a great aggregation of capital, exposed to immense risk, some limitation of responsibility is necessary in order that men may be induced to contribute to the enterprise. As Grotius says, in reference to this very matter of ship-owners: "Men would be deterred from owning and operating ships, if they were subject to the fear of an indefinite liability for the acts of the master." De Jure B. lib. 2, c. 11, § 13.

But it is enough to say, that the rule of limited responsibility is now our maritime rule. It is the rule by which, through the act of congress, we have announced that we propose to administer justice in maritime cases. We see no reason, in the absence of any different law governing the case, why it should not be applied to foreign ships as well as to our own, whenever the parties choose to resort to our courts for redress. Of course the rule must be applied, if applied at all, as well when it operates against foreign ships as when it operates in their favor.

English cases have been cited to show that the courts of that country hold that their statutes prior to 1862, which in generality of terms were similar to our own, did not apply to foreign ships. See The Nostra Signora de los Dolores, 1 Dod. 290; The Carl Johan, cited in The Dundee, 1 Hagg. Adm. 109, 113; The Girolamo, 3 Hagg. Adm. 169, 186; The Zollverein, 1 Swab. 96; Cope v. Doherty, 4 Kay & J. 367, 2 De Gex & J. 614; General Iron Screw Collier Co. v. Schurmanns, 1 Johns. & H. 180; The Wild Ranger, 1 Lush. 553. We have examined these cases. So far as they stand on general grounds of argument, the most important consideration seems to be this, that the British legislature cannot be supposed to have intended to prescribe regulations to bind the subjects of foreign states, or to make for them a law of the high sea; and that if it had so intended, it could not have done it. This is very true. No nation has any such right. Each nation, however, may declare what it will accept and, by its courts, en-

force as the law of the sea, when parties choose to resort to its forum for redress. And no person subject to its jurisdiction, or seeking justice in its courts, can complain of the determination of their rights by that law, unless they can propound some other law by which they ought to be judged; and this they cannot do except where both parties belong to the same foreign nation; in which case, it is true, they may well claim to have their controversy settled by their own law. Perhaps a like claim might be made where the parties belong to different nations having the same system of law But where they belong to the country in whose forum the litigation is instituted, or to different countries having different systems of law, the court will administer the maritime law as accepted and used by its own sovereignty.

The English courts say that, as foreigners are not subject to their law, nor entitled to its benefits, they will resort to the general law of general liability when foreigners are litigants before them. Where do they find such general law? In the law of nature? or the civil or common law? Is not the maritime law, as their own legislature or national authority has adopted it, as imperative as either of these? Does it not, in the British judicial conscience, stand for the law of nature, or general justice? As for the civil and common laws, they are only municipal laws where they have the force of laws at all. The better grounds for the English decisions seem to be the peculiar terms of the acts of parliament on the subject, and the supposed policy of those acts, as being intended for the encouragement of the British marine. From these considerations, as grounds of construction, the conclusion may have been properly deduced that the law was intended to be confined to British ships. The question, it is true, has ceased to be of practical importance in England, since the act of 1862 (25 & 26 Vict. c. 63), by which the owners of any ship, British or foreign, are not to be answerable, without their actual fault or privity, for any loss or damage to person or property, to an amount exceeding £15 per ton of the ship's registered tonnage, or its equivalent in case of foreign ships. But the former English decisions are thought to have a bearing on our law, because the acts of parliament to which they related, in their principal clauses, were conceived in the same broad and general terms as our act of congress. Some of the clauses of the British acts, however, relating to registered tonnage and other particulars, admitted only a special application to British ships; and perhaps these clauses did require a restricted construction of the whole acts to such ships.

But there is no demand for such a narrow construction of our statute, at least of that part of it which prescribes the general rule of limited responsibility of ship-owners. And public policy, in our view, requires that the rules of the maritime law as accepted by the United States should apply to all alike, as far as it can properly be done. If there are any specific provisions of our law which cannot be applied to foreigners, or foreign ships, they are not such as interfere with

the operation of the general rule of limited responsibility. That rule, and the mode of enforcing it, are equally applicable to all. They are not restricted by the terms of the statute to any nationality or domicile. We think they should not be restricted by construction. Our opinion, therefore, is that in this case the National Steamship Company was entitled to the benefit of the law of limited responsibility.[87] * * *

[87] Accord: The Leon, 6 P. D. 148 (1881).

A ship will not be open to blame for following the sailing regulations and rules of navigation prescribed by its government for its direction on the high seas. The Scotia, 14 Wall. 170, 20 L. Ed. 822 (1871).

Damages in admiralty for the death of a human being on the high seas, caused by negligence, are not recoverable in the absence of an act of Congress. The Harrisburg, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358 (1886). But where the law of the state to which a vessel belongs gives such right of action, and the death occurs on the high seas on board of the vessel, it will be enforced in an admiralty court of the United States as a claim against the fund arising in a proceeding to limit liability. The Hamilton, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264 (1907); La Bourgogne, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. Ed. 973 (1908).

In regard to collisions upon the high seas, see, in general, G. Phillip Wardner. The Enforcement of a Right of Action Acquired under Foreign Law for Death upon the High Sea, 21 Harv. L. Rev. 1–23, 75–91.

The law of the owner's state and not that of the state where the ship is registered has been applied to a tort committed on a ship upon the high seas. International Nav. Co. v. Lindstrom, 123 Fed. 475, 60 C. C. A. 649 (1903). In favor of the general maritime law, see Elder Dempster Shipping Co. v Pouppirt, 125 Fed. 732, 60 C. C. A. 500 (1903).

Collisions occurring within the territorial waters of a nation and torts committed upon a vessel within such territorial waters have been held to be governed by the law of the state within whose waters they occurred. Smith v. Condry, 1 How. 28, 11 L. Ed. 35 (1843); Geoghegan v. Atlas S. S. Co., 22 N Y. Supp. 749, 3 Misc. Rep. 224 (1893). See, also, Charles N. Gregory, Jurisdiction over Foreign Ships in Territorial Waters, 2 Mich. Law Rev. 333–357.

Salvage is determined by the maritime law as generally adopted by maritime nations. Anderson v. The Edam (D. C.) 13 Fed. 135 (1882).

General average is adjusted in accordance with the law of the port of discharge. Simonds v. White, 2 B. & Ch. 805 (1824); The Energia (D. C.) 61 Fed. 222 (1894). Accord: *France*, App. Rouen, March 20, 1878 (5 Clunet, 599). *Germany*, 8 R. O. H. G. 289 (Dec. 23, 1872). Compare: O. L. G. Hamburg, Jan. 30, 1893 (4 Niemeyer, 353). But if the voyage is not completed, the law of the place where it was broken up may become applicable. The Eliza Lines (C. C.) 102 Fed. 184 (1900), affirmed 114 Fed. 307, 52 C. C. A. 195 (1902); National Board of Marine Underwriters v. Melchers (D. C.) 45 Fed. 643 (1891).

CONTINENTAL LAW.—It is said that collisions in the territorial waters of a nation are governed by the local law. *France*, App. Caen, June 23, 1897 (13 Autran, 282); Cass. July 18, 1895 (S. 1895, 1, 305) Cass. Feb. 15, 1905 (S. 1905, 1, 209). *Germany*, R. G. May 30, 1888 (44 Seuffert's Archiv. 133); R. G. Dec. 11, 1901 (12 Niemeyer, 121). But in each of the above cases the collision occurred within the territorial waters of the country where the suit was brought. German law has been held applicable to a collision between German vessels in foreign waters. Supreme Hans. Ct., Nov. 12, 1906 (22 Autran, 666). In Italy the liability of the owner of a vessel for the wrongful acts of the captain has been determined with reference to the law of the place where the mandate was given. Trib. Civ. Naples, June 5, 1899 (15 Autran, 524).

If the collision occurred upon the high seas, French courts will apply the national law of the offending vessel. Cass. Nov. 4, 1891 (S. 1892, 1, 69); App. Rennes, Dec. 21, 1887 (S. 1888, 2, 25) and note by Ch. Lyon-Caen; Trib. Com. Marseilles, Dec. 21, 1900 (16 Autran, 809). So *Italy*, Cass. Turin, April 17,

1903 (19 Autran, 478); App. Genoa, Dec. 10, 1894 (S. 1896, 4, 9) and note; but in App. Genoa, March 24, 1902 (17 Autran, 645), the national law of the vessel collided with was held to govern. The German courts apply the law of the forum (R. G. Nov. 10, 1900 [12 Niemeyer, 457]; R. G. Oct. 22, 1902 [31 Clunet, 406]), unless both vessels belong to the same country or are subject to the same law, in which event such law will govern (49 R. G. 182 [Nov. 18, 1901]). See, also, Louis Franck, De l'abordage en droit international, 22 Clunet, 952–981; P. Turgon, De la compétence des tribunaux français en cas d'abordage entre navires étrangers, 22 Autran, 245–256.

QUASI CONTRACTS AND STATUTORY LIABILITIES.—Quasi contractual obligations will in general be determined in accordance with the law of the place where such obligations arise. See Healy v. Gorman, 15 N. J. Law, 328, ante p. 348; Curtis v. Delaware, L. & W. R. Co., 74 N. Y. 116, 30 Am. Rep. 271, ante, p. 350.

As to the enforcement abroad of the statutory liability of stockholders and directors, see Beale on Foreign Corporations, 595–616, and 34 L. R. A. 737–763. Such liability will be enforced by the courts of other states if they can do so without injustice to any of the stockholders. Whitman v. Oxford Nat. Bank, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587 (1900); Miller v. Smith, 26 R. I. 146, 58 Atl. 634, 66 L. R. A. 473, 106 Am. St. Rep. 699 (1904). But see Converse v. Hamilton (Wis.) 118 N. W. 190 (1908). As to whether a state in which a foreign corporation transacts business has the power to impose a statutory liability upon its stockholders which shall be recognized by the courts of other states, see Pinney v. Nelson, 183 U. S. 144, 22 Sup. Ct. 52, 46 L. Ed. 125 (1901); Risdon I. & L. Works v. Furness, 74 L. J. K. B. 243 (1904). See, also, 18 Harv. L. Rev. 452, and 6 Col. L. Rev. 45; W. N. Hohfeld, Nature of Stockholders' Individual Liability for Corporation Debts, 9 Col. L. Rev. 285–320, 492–522; 10 Col. L. Rev. 283–326, 520–549.

CHAPTER III.

FAMILY LAW.

SECTION 1.—MARRIAGE.

In re HALL.

(Supreme Court, Appellate Division, New York, 1901. 61 App. Div. 266, 70 N. Y. Supp. 406.)

SMITH, J.[1] Unless the appellant was the illegitimate son of Alice Maude Fithian, and therefore not of kin to Ella Maria Fithian, named in the will, the decree of the surrogate cannot stand.

Edwin Fithian, the father of Alice Maude Fithian, was a retired American naval officer. While traveling in Europe, the daughter, Alice Maude, was placed in a school at Milan. From there she eloped at the age of 19 with Alberto Martinez, a citizen of the Argentine Republic. They went to Paris, where they stayed not more than four days, when they departed for the Argentine Republic. At Paris some form of marriage service was performed. At Buenos Ayres they lived as husband and wife for about 18 months, when Martinez sent her to her father, in England, and thereafter refused to live with her or to support her, and deserted her. Thereafter the said Alice Maude came with her father to Dakota, where a judgment of divorce against Martinez is claimed to have been obtained. She thereafter married Richmond Kingman in Dakota, where to that marriage this appellant was born. The surrogate has found that a valid marriage was contracted with Martinez in France, and that the decree of divorce obtained in Dakota was invalid on the ground that the said Alice Maude had not at the time of the commencement of the action established a domicile in the state of Dakota sufficient, under the laws of Dakota, to give jurisdiction to the court to grant a decree.

Three questions, then, require examination: First. Did the surrogate properly hold that a valid and binding marriage had been contracted by Alice Maude Fithian with Alberto Martinez in Paris?[2] Second. Did Alice Maude acquire in Dakota, prior to the commencement of her action, a domicile sufficient to give jurisdiction to the Dakota court to authorize the decree of divorce? Third. If the decree of divorce granted in Dakota was valid in that state, can this infant

[1] The statement of facts has been omitted.

[2] Only so much of the opinion is given as relates to the first question.

appellant take property as one of the next of kin of Ella Maria Fithian, under the laws of this state?

1. The record contains the Civil Code of France, by which marriages are regulated. By that law it is required that a marriage be celebrated at the domicile of one of the parties, and a residence of six months is required to constitute such a domicile; that a record of the proposed marriage be made, and two publications thereof, with an interval of eight days between them, on a Sunday, before the door of the town hall; that the consent of the girl's parents, if living, if she be under the age of 21 years, appear; and that the celebration of the marriage be had before a civil officer. It appears in this case that with none of these conditions did the parties comply. They were in Paris not to exceed three or four days before the marriage ceremony claimed. No domicile, therefore, could have been acquired. No publication could have been made in accordance with the laws of France. The father's consent was confessedly wanting. In fact, it is admitted and found by the learned surrogate that the marriage was not, and could not have been, performed in accordance with the requirements of the Civil Code of France. The marriage is held valid by the surrogate, however, as a putative marriage under a supposed fiction of the French law. The statutory basis of such a finding is contained in the following articles of the Civil Code of France:

"Art. 201. If a marriage has been declared void, not only the parties to the marriage but the issue thereto shall nevertheless enjoy all civil rights resulting therefrom, if the marriage was contracted in good faith.

"Art. 202. If only one party was in good faith, only the party in good faith and the issue of the marriage shall be entitled to the civil rights resulting therefrom." (See Kelly's French Law of Marriage [2d Ed.] 170.)

The surrogate has found that the marriage in France was contracted by Alice Maude in good faith. If it were necessary to review this finding, a serious question is presented,—whether good faith, in the eye of the law, can co-exist with an elopement and clandestinity. Authorities are not wanting which hold that clandestinity is incompatible with the good faith required by law to give civil rights in an illegal marriage. But assume, for the argument, that the attempted marriage was contracted by her in good faith. It is not found, nor could it be found, that there was good faith on the part of Martinez. To him the French law gave no civil rights of the marriage. These sections of the Civil Code are found in a chapter of the Code entitled "Of Actions to Annul Marriage." There is no other provision of the French law determining what shall be the rights of parties innocent or guilty, to a marriage not contracted with the formalities required by law. The learned surrogate has held that this "putative marriage," as he calls it, constituted a valid marriage, which was a bar to the remarriage of Alice Maude before it was annulled by a court of com-

petent jurisdiction. Is this conclusion correct? While it was undoubtedly competent for the French government so to declare of marriages there celebrated, it has been seen that they have not expressly so declared. Such an important provision in the law, if not expressed, should be found only by necessary implication. In the first place, such implication is not warranted by the sections of the French Code. It might well be inferred that the rights assured to an innocent party to a void marriage upon annulment should belong to such a party before an annulment of the attempted marriage. But those rights are simply the civil rights of property. The purpose of the law in granting civil rights to an innocent party is fully accomplished by according to her and her children the rights of property. It can add nothing to give her a status as a married woman. Such a construction would, and in this case has, worked to the detriment, rather than the benefit of the person for whose benefit the law was enacted. The very fact that those rights are given only to an innocent party, while withheld from a party not innocent, is, to our minds, convincing of an intent to award to the innocent party only property rights, and legitimacy to the children. The marriage is not declared valid, even though both parties be innocent. Much less could it be if one party only be innocent, and the civil rights of the marriage refused to a guilty party. * * *

The respondent's counsel upon the argument further claimed the marriage in France valid upon the ground that, as neither Alice Maude nor Martinez were residents of France, the French law was not applicable. We are referred to the case of Loring v. Thorndike, reported in 5 Allen (Mass.) at page 257. In that case an American and a resident of Mayence, in the grand duchy of Hesse-Darmstadt were temporarily residing in the free city of Frankfort, in Germany. Neither of them ever had any domicile there. Upon making inquiries of magistrates and counsel, they were advised that they could be legally married before the consul of the United States. There was thereupon a marriage agreement drawn up and signed, and the consul declared their marriage legal and valid. The validity of this marriage was questioned by reason of the fact that it was not performed in accordance with the laws of the city of Frankfort. The court, however, held that the formalities specifically required by the Frankfort law were not applicable to foreigners, but the marriage was valid in Frankfort, "as having been duly contracted according to the prescription of that portion of the common law which had not there been abrogated or repealed." If, then, the common law was in force in Frankfort, as it appears, and if the special marriage laws made did not apply to foreigners temporarily there, the parties were there married in accordance with the laws of Frankfort, and the marriage valid there was valid everywhere. Assuming, then, for the argument, that the formalities required by the laws of France do not apply to foreigners temporarily in France, there is no proof that the common

law is there applicable, so as to render valid a common-law marriage. In fact, the court will take judicial notice that the common law is not, and never was, in force in France.

It is further urged that the marriage will be presumed to have been contracted at a consulate. But, to be valid if there contracted, it must accord with the laws of the domicile of the contracting parties. Here the contracting parties had no common domicile. While, perhaps, under the laws of the domicile of Alice Maude a common-law marriage would be valid, not so under the laws of the domicile of Martinez. In the record appear the laws of the Argentine Republic. No facts appear in the record which would justify a finding that the marriage was contracted in accordance with these laws, nor is such a finding claimed. The marriage, then, appears to have been invalid both by the laws of France and by the laws of the Argentine Republic, the domicile of the husband. Alberto Martinez was never married to Alice Maude. He was not her husband. If the conclusion of the learned surrogate be correct, she was a married woman without a husband. This is clearly a legal paradox. There can be no marriage vinculum which does not bind both parties. In Atherton v. Atherton, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794, Justice Gray, in writing for the United States supreme court, says, "A husband without a wife, or a wife without a husband, is unknown to the law." The assumed marriage, not binding upon Martinez, except possibly to bind him for her support, did not invest her with the status of a married woman. Alice Maude therefore had capacity at any place to contract the marriage with Kingman, and the appellant is her lawful offspring.

We do not here decide whether the French law is applicable to the marriage of foreigners temporarily in France, either as to the formalities required, or as to the civil rights acquired thereunder. Nor do we decide whether under that law civil rights are given to an innocent party to an attempted marriage, in disregard of every formality required by that law. We are unable to find a binding marriage under any law which can be applicable to the conditions here existing, and, even though under the law civil rights attached to this marriage, such civil rights create no marriage status.[3] * * *

[3] See 57 L. R. A. 155–159, and 1 Bishop on Marriage, Divorce & Separation, §§ 890–906.

As to whether compliance with the local law as to form is obligatory, see Ruding v. Smith, 2 Hagg. Cons. 371, 390 (1821); Kent v. Burgess, 11 Sim. 361 (1840); Hynes v. McDermott, 82 N. Y. 41, 37 Am. Rep. 538 (1880); Id., 91 N. Y. 451, 43 Am. Rep. 677 (1883).

As to marriages celebrated upon the high seas, consult Norman v. Norman, 121 Cal. 620, 54 Pac. 143, 42 L. R. A. 343, 66 Am. St. Rep. 74 (1898); Dicey, Conflict of Laws, 620–621; J. Dundas White, Marriages at Sea, 17 Law Quar. Rev. 283–292; A. H. Charteris, Marriage on the High Seas, 19 Juridical Review, 178–182.

As to marriages celebrated before a consular or diplomatic officer, see Rev.

OGDEN v. OGDEN.

(Court of Appeal, 1907. [1908] Prob. 46, 77 L. J. Prob. 34.)

Léon Philip, a French subject and domiciled in France, being a temporary resident in England, married, September, 1898, Sarah Helen Williams, an Englishwoman, domiciled in England. The ceremony was in English form and took place in England. The parties cohabited for a short time in England, whereupon Philip's father went over to England and took his son to France. In 1901, the marriage was annulled by a decree of a French tribunal on the ground that the consent of the parents as required by French law (Philip being actually only 19 years of age), had not been obtained. Philip having married again in France, Sarah instituted, in 1903, a suit in England for the dissolution of her alleged marriage with him on the ground of desertion and adultery. This petition was dismissed on the ground of want of jurisdiction. In 1904, Sarah married William Henry Ogden in England. In 1906, Ogden instituted a suit to obtain a decree of nullity of the marriage on the ground that Sarah's previous marriage to Philip had not been annulled or dissolved for any cause competent according to the law of England. Bargrave Deane, J., rendered a decree in favor of petitioner. From this decision an appeal was taken.[4]

Sir GORELL BARNES, President.[5] This is an appeal in a case of considerable importance and interest, more especially to persons in this country who have entered into, or contemplate entering into, matrimonial relations with foreigners. The facts which give rise to the question are these. [Having stated the facts as above set out, his Lordship continued:] The case was very fully and ably argued by counsel on behalf of the respective parties, and two points were made for the appellant by her counsel, Sir Edward Clarke; the first, that her marriage with Léon Philip was not valid, inasmuch as, although the marriage was celebrated according to the forms required by the law of England, it was invalid both in this country and in France, because Léon Philip was, by the law of France, being the law of his country and his domicil, incapable of contracting the marriage; the second, that the effect of the French decree was to annul the marriage, both in France and in this country. If both or either of these points were established in favour of the appellant, the contention on her part which followed as a matter of course was that at the time of

St. U. S. § 4082 (U. S. Comp. St. 1901, p. 2768); 2 Moore, Int. Law Digest, §§ 237–240; 2 Wharton, Int. Law Digest, § 261.

As to extraterritorial privileges, see 2 Moore, Int. Law Digest, §§ 238–239.

See, also, Dicey, Conflict of Laws, 613–633; Westlake, Priv. Int. Law, 62–67; G. Addison Smith, The Marriage of British Subjects Abroad, 19 Juridical Review, 369–385.

[4] This brief statement has been substituted for that of the original report.

[5] Portions of the opinion have been omitted.

the ceremony of marriage between herself and Mr. Ogden she was free to contract a marriage with him, and that, therefore, her marriage with him was valid, and his petition should be dismissed.

Evidence was given at the trial of the French law upon which the appellant relied. The French Civil Code was put in, and various sections of that Code were referred to on the argument of this appeal, to some of which it is necessary to draw attention. By article 1, § 3, the laws relating to the condition and privileges of persons govern Frenchmen although residing in a foreign country. By title II, § 63, two publications with an interval of eight days between them have to be made, containing particulars of the proposed marriage. Title V contains (inter alia) provisions which, translated into English, are as follows: [Having read the articles from the French Civil Code set out above,[6] his Lordship proceeded:] It would seem from these provisions that a marriage without the necessary consent or publication is not made by the Code void from the outset, but will only be declared void if proceedings for that purpose are taken by the proper parties in proper time, and will be valid unless the declaration is made.

These being the facts and the points raised, counsel for the appellant endeavoured to support his first point by urging before the court certain propositions which were wider than that which it is necessary to consider for the purpose of determining the present case. It is not necessary in this case to consider what are the principles which ought to govern a decision in England upon the question of the validity in this country of a marriage celebrated therein between two foreigners domiciled abroad and incapable by the law of their domicil of marrying each other at all. It is not even necessary for the decision of this case to consider what has been or ought to be decided as to the validity of a marriage entered into in England between two foreigners domiciled abroad where they have come to this country in order to avoid a difficulty with regard to formalities which are required by the law of their domicil for the celebration of a valid marriage in their own country.

The simple question for determination in the present case upon the first point is whether or not a marriage taking place in England between an English person domiciled in England with a foreigner temporarily residing in this country, which it was not disputed would be held in England to be a valid marriage if celebrated between two inhabitants of this country, ought to be held invalid on the ground that the foreigner was by the statute law of his country subjected to the necessity of complying with certain formalities in order to be at liberty to enter into the marriage. It is desirable to state this limited proposition very clearly, because, with regard to questions which may be raised as to the validity of marriages in England between persons

[6] The articles referred to, which have been omitted, were 144, 148–153, 170, 182, 183, 185, 201, and 202.

domiciled abroad, certain cases have been decided (to which reference will be made further on in this judgment) which do not necessarily involve the consideration of the particular point already indicated, or any decision thereupon; and it is desirable, therefore, to avoid the confusion which appears to have arisen sometimes between the consideration of the principles which have been laid down for determining the validity of a marriage where the ceremony alone was in question, and of those which have been considered, in determining whether it was lawful for the parties to intermarry at all.

Now, the argument for the appellant in the present case was that, although the marriage between her and Léon Philip was celebrated according to the forms required by the English law, it was invalid universally because Léon Philip was a minor in France, and under a disability by the law of France from contracting such marriage without the consent of his father, and without complying with the other formalities required by the law of France. In substance this contention amounted to this—that in regard to entering into a marriage in England with an inhabitant thereof, Léon Philip carried with him into this country an incapacity, which ought to be recognized by the law of England, to enter into matrimonial relationship with such inhabitant without complying with the provisions of the French Code. It was urged that this principle had been recognized in this country, and cases were cited which it was said supported the contention. The cases cited, however, do not support it, and in truth the argument on behalf of the appellant appears to be based upon views which have been expressed by foreign jurists, but which have not been adopted in this country, where the English courts have not been very ready to admit a personal law of status and capacity dependent on domicil, and travelling with the person from country to country, although there has been, perhaps, less unwillingness in later years to give effect to the lex domicilii to some extent; see, for instance, In re Goodman's Trusts, (1881) 17 Ch. D. 266. * * *

It would needlessly lengthen this judgment to set out the passages from foreign jurists bearing upon this subject, and it is not necessary to examine at length those cases or those passages in the above-mentioned work[7] or other commentaries which deal with cases in which a marriage is entirely prohibited by the laws of the domicil of both or either of the parties, and yet is permitted by the laws of the place of celebration, for we are concerned in this case only with the question of a disability imposed by foreign law upon one of the parties to the marriage in respect only of want of parental consent, and compliance with certain formalities required by such foreign law.

There appears to be no case in this country (certainly no case was cited to us in argument on this appeal) in which in such a case as last mentioned the view has been expressed that such a marriage would

[7] Story on the Conflict of Laws.

be held invalid in this country. We know of no principle recognized by English law which would justify the court in coming to the conclusion that such a marriage ought to be held invalid; for, although to a certain extent the lex domicilii is recognized in this country, for instance, in the familiar case where it is held that mobilia sequuntur personam, yet such recognition appears never to have been extended to the case of a matrimonial engagement entered into in this country between an inhabitant of another country and an inhabitant of this country. In such a case, where there are two different systems of law, one may well ask, which is to prevail? Why should it be recognized that a person who comes over to this country and validly enters into a marriage with one of its inhabitants according to English law should be held unable to do so here because of the regulations of a foreign system of jurisprudence which places upon him a personal incapacity to contract unless he complies with formalities required by the foreign law? It may be observed here that the 3rd section of article 1 of the French Civil Code ordains that the French laws relating to the conditions and privileges of persons are to govern Frenchmen although residing in a foreign country, so that it would seem from this provision that the French rule as to competency by reason of minority is not based upon domicil, but upon nationality, and therefore that even in the case of a Frenchman domiciled in England celebrating a marriage with a domiciled Englishwoman the French courts would be at liberty, if the question arose before them, to declare such a marriage null and void, on the ground that it was governed by the laws of France, although celebrated in this country; but it could hardly be contended in England, if both persons parties to a marriage were domiciled in this country, that our courts ought to hold such a marriage invalid because one of the parties by the laws of his or her nationality may not have adequate competency to enter into the contract.

[The learned justice here examined the following cases: Herbert v. Herbert, 1819, 3 Phill. 58; Scrimshire v. Scrimshire, 2 Hagg. Cons. 395; Brook v. Brook, 9 H. L. C. 193 (1861); DeWilton v. Montefiore, (1900) 2 Ch. 481; Commonwealth v. Lane, 113 Mass. 458, 18 Am. Rep. 509 (1873); Simonin v. Mallac, 2 Sw. & Tr. 67 (1860); and continued as follows:]

The case principally relied on by the appellant was the case of Sottomayor v. De Barros (2 P. D. 81; 3 P. D. 1) before Sir Robert Phillimore, and afterwards on appeal before the Court of Appeal, where the petitioner and respondent, Portuguese subjects and first cousins, came to reside in England in 1858. In 1866 they went through a form of marriage before the registrar of the district of the city of London, and in 1873 they returned to Portugal, and continued to reside there. By the law of Portugal a marriage of Portuguese subjects, being first cousins, without dispensation, wheresoever contracted, is invalid. The wife afterwards, while residing with her parents at Lisbon, filed a

petition in this country for a declaration of nullity of marriage. The respondent appeared, but did not file an answer, and the matter came on unopposed before Sir Robert Phillimore, who directed that the papers should be sent to the queen's proctor, in order that he might argue the questions raised, and the queen's proctor thereupon appeared. The questions were argued, and in the result Sir Robert Phillimore felt himself bound by prior decisions, and especially that in Simonin v. Mallac, 2 Sw. & Tr. 67, and dismissed the petition.

The petitioner appealed to the Court of Appeal. The judgment of the court, consisting of James, Baggallay, and Cotton L. JJ., was delivered by Cotton L. J., and one of the principal arguments addressed to us upon this appeal was based upon that judgment. The decision of the court below was reversed. The basis of that judgment is to be found in the following sentence at page 5 of the report: "But it is a well-recognized principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicil. It is, however, urged that this does not apply to the contract of marriage, and that a marriage valid according to the law of the country where it is solemnized is valid everywhere. This, in our opinion, is not a correct statement of the law. The law of a country where a marriage is solemnized must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted; but, as in other contracts, so in that of marriage, personal capacity must depend on the law of domicil; and if the laws of any country prohibit its subjects within certain degrees of consanguinity from contracting marriage, and stamp a marriage between persons within the prohibited degrees as incestuous, this, in our opinion, imposes on the subjects of that country a personal incapacity, which continues to affect them so long as they are domiciled in the country where this law prevails, and renders invalid a marriage between persons both at the time of their marriage subjects of and domiciled in the country which imposes this restriction, wherever such marriage may have been solemnized."

Now this court hearing this appeal is bound by the decision of the Court of Appeal in this case of Sottomayor v. De Barros, 2 P. D. 81; 3 P. D. 1. It is not necessary, even if we were at liberty to do so, to consider whether that case was rightly decided, but it is permissible to point out that the commencement of the paragraph above set out could scarcely be considered correct in stating that "it is a well-recognized principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicil," for, if so, it would logically seem to follow that that part of the judgment which indicates that the opinion of the court was confined to cases where both the contracting parties were, at the time of their marriage, domiciled in a country, the laws of which prohibited their marriage, should not have expressed that limitation, and that the case of Simonin v. Mallac, 2 Sw. & Tr. 67, should have been overruled, and

yet that case, according to our reading of the judgment, is approved. The probability is that that sentence should be read with the context, and be confined to the case present to the minds of the court in relation to marriages which could not be contracted at all by the laws of the country of domicil. Even then it may be questioned whether that sentence is correct, and whether the question of capacity is really raised at all in such a case; that is to say, where both the parties are capable of entering into a marriage but may not marry each other because such a marriage would be illegal in their own country. That is rather a question of illegality than of capacity, and it may, perhaps, not be unreasonable for one country to refuse to recognize a marriage contracted in it between two persons by the laws of whose domicil a marriage between them is illegal, and yet it may be quite proper and reasonable for a country, in which a marriage takes place between persons domiciled in another country, to recognize it as a valid marriage when it would be legal in such other country if contracted after compliance with all formalities required in such other country, and, further, to protect its citizens in all cases of marriages where one of the contracting parties is domiciled in the country first referred to—that is to say, where the marriage takes place—and the other is domiciled in a foreign country, and there is a conflict between the laws of the two countries as to the validity of the marriage. The passage in the judgment expressly confining the decision to the case then before the court is as follows: "It was pressed upon us in argument that a decision in favor of the petitioner would lead to many difficulties if questions should arise as to the validity of a marriage between an English subject and a foreigner in consequence of prohibitions imposed by the law of the domicil of the latter. Our opinion on this appeal is confined to the case where both the contracting parties are, at the time of their marriage, domiciled in a country the laws of which prohibit their marriage. All persons are legally bound to take notice of the laws of the country where they are domiciled. No country is bound to recognize the laws of a foreign state when they work injustice to its own subjects, and this principle would prevent the judgment in the present case being relied on as an authority for setting aside a marriage between a foreigner and an English subject domiciled in England on the ground of any personal incapacity not recognized by the law of this country."

It was upon this passage that, when the case subsequently came before Lord Hannen, he was able to decide in favor of the marriage being valid notwithstanding the fact that one of the parties was domiciled in Portugal.

The concluding passage in the judgment of the Court of Appeal is as follows: "It only remains to consider the case of Simonin v. Mallac, 2 Sw. & Tr. 67. The objection to the validity of the marriage in that case, which was solemnized in England, was the want of consent of parents, required by the law of France, but not under the circumstances

by that of this country. In our opinion this consent must be considered a part of the ceremony of marriage, and not a matter affecting the personal capacity of the parties to contract marriage, and the decision in Simonin v. Mallac, 2 Sw. & Tr. 67, does not, we think, govern the present case."

That may perhaps be considered only a dictum by the learned Lords Justices, but it is really a very strong statement that Simonin v. Mallac, 2 Sw. & Tr. 67, is clearly distinguishable from the case before them, and we regard it as an approval of the decision in that case, and, if so, it is an authority adverse to the contention of the appellant on the present appeal. The case having been thus argued in the Court of Appeal by the queen's proctor, under the provisions of section 5 of the Matrimonial Causes Act, 1860, was remitted to the Probate Division in order that the question of fact raised by the queen's proctor's plea should be considered. It was then heard before Lord Hannen, who found, as a fact, that the respondent, the husband, was domiciled in England, but that the domicil of the petitioner was Portuguese.

In the course of his judgment he pointed out how the passage in the judgment of the Court of Appeal expressly confining the decision to the case then before the court left him free to consider whether the marriage of the respondent, who was domiciled in England, with a woman subject by the law of her domicil to a personal incapacity not recognized by English law, must be declared invalid by the tribunals of this country, and he commented (5 P. D. at p. 100) upon the passage in the judgment which formed the basis of the decision, and remarked that it appeared to him to put forward a novel principle for which, up to the present time, there had been no English authority. He then cited the case of Male v. Roberts, (1799) 3 Esp. 163, in which the contract upon which the defendant was sued was made in Scotland, the defence being that the defendant was an infant, and where Lord Eldon held the defence bad, saying, "If the law of Scotland is that such a contract as the present could not be enforced against an infant, that should have been given as evidence. The law of the country where the contract arose must govern the contract;" and after referring to the cases of Scrimshire v. Scrimshire, 2 Hagg. Cons. 395, and Simonin v. Mallac, 2 Sw. & Tr. 67, and other cases, he held that the marriage between the petitioner and respondent was valid, and dismissed the petition.

It appears to have been suggested that the papal dispensation of which the law of Portugal recognizes the validity could not be distinguished in principle from the consent of a parent; but Cotton L. J. stated in his judgment that it could not, in the opinion of the court, be held that such a dispensation is a matter of form affecting only the sufficiency of the ceremony by which the marriage was effected. Mr. Foote's remarks upon this question in his book on Private International Jurisprudence (3d Ed.) p. 367, are much in point: "Dispensation with a law is, in principle, a very different thing from compliance with its

directions, though in practice the effect of the two may sometimes be similar. In such a case as Sottomayor v. De Barros, 2 P. D. 81; 3 P. D. 1, the law of Portugal does not say that, when first cousins wish to intermarry, they shall obtain the written consent of the Pope to their doing so. It says they shall not marry at all, and such a prohibition by a domiciliary law is not the less complete, as far as other tribunals are concerned, because the same domiciliary law, under certain circumstances, allows itself to be dispensed with."

The last case in which the case of Simonin v. Mallac, 2 Sw. & Tr. 67, has been referred to was the case of Hay v. Northcote, (1900) 2 Ch. 262, in which Farwell, L. J. (then Farwell J.), followed that case. * * *

After very careful consideration of the present case we have come to the conclusion that the first point must be decided against the appellant, and that the marriage between her and Léon Philip must be declared valid in England.

[In regard to the second point it was held that the decree of the French court declaring the marriage to be null according to articles 148 and 170 of the French Civ. Code would not be recognized in England.]

Appeal dismissed.[8]

COMMONWEALTH v. LANE.

(Supreme Judicial Court of Massachusetts, 1873. 113 Mass. 458, 18 Am. Rep. 509.)

GRAY, C. J.[9] The report finds that the defendant was lawfully married to his first wife in this Commonwealth; that she obtained a divorce here from the bond of matrimony, for his adultery; that he was afterwards, while still a resident of this Commonwealth, married to a second wife in the State of New Hampshire, and cohabited with her in this Commonwealth, the first wife being still alive; and the question is whether he is indictable for polygamy, under the Gen. St. 1860, c. 165, § 4.

It is provided by our statutes of divorce that, in cases of divorce from the bond of matrimony, the innocent party may marry again as if the other party were dead; but that any marriage contracted by the guilty party during the life of the other, without having obtained

[8] As to essentials of marriage, consult Foote, Priv. Int. Jurispr. 360–370; Westlake, Priv. Int. Law, 58–61. Formerly the lex loci governed. Dalrymple v. Dalrymple, 2 Hagg. Cons. 54 (1811).

On the continent the consent of parents is deemed to relate to the essentials of a marriage and not to its form. *France*, App. Besançon, Jan. 4, 1888 (D. 1889, 2, 69). *Germany*, A. G. Celle, Jan. 15, 1870 (24 Seuffert's Archiv. 1). *Italy*, App. Florence, Aug. 7, 1907 (La Legge 1907, 2230).

[9] The statement of facts and a part of the opinion have been omitted.

leave from this court to marry again, shall be void, and such party shall be adjudged guilty of polygamy. Gen. St. c. 107, §§ 25, 26. St. 1864, p. 279, c. 216.

The marriage act, Gen. St. c. 106, specifies, in sections 1–3, what marriages shall be void by reason of consanguinity or affinity; in section 4, that all marriages contracted while either of the parties has a former wife or husband living, except as provided in chapter 107, shall be void; in section 5, that no insane person or idiot shall be capable of contracting marriage; and in section 6 as follows: "When persons resident in this state, in order to evade the preceding provisions, and with an intention of returning to reside in this state, go into another state or country, and there have their marriage solemnized, and afterwards return and reside here, the marriage shall be deemed void in this state."

All these sections, except the last, are manifestly directed and limited to marriages within the jurisdiction of this Commonwealth; and the last has no application to this case, because it does not appear to have been proved or suggested at the trial that the parties to the second marriage went out of this state to evade our laws, or even that the second wife had resided in this state or knew of the previous marriage and divorce.

By the Gen. St. c. 165, § 4, "whoever, having a former husband or wife living, marries another person, or continues to cohabit with such second husband or wife in this state," shall (except when the first husband or wife has for seven years been absent and not known to the other party to be living, or in case of a person legally divorced from the bonds of matrimony and not the guilty cause of such divorce) be deemed guilty of polygamy and punished accordingly.

This statute is not intended to make any marriages unlawful which are not declared to be unlawful by other statutes, nor to punish cohabitation under a lawful marriage. Its object is to prohibit unlawful second marriages, whether the parties are actually married in this Commonwealth, or continue after being married elsewhere to cohabit here. But in either alternative, in order to sustain the indictment, the second marriage must be unlawful. It is not enough that the marriage is such as would be unlawful if contracted in this Commonwealth; it must be a marriage which, being contracted where it was, is unlawful here.

The marriage in New Hampshire is stated in the report to have been "according to the forms of law;" and it appears by the statutes of New Hampshire, therein referred to, that the only provision relating to the invalidity of marriages on account of the incompetency of parties to contract them is as follows: "All marriages prohibited by law, on account of the consanguinity or affinity of the parties, or where either has a former wife or husband living, knowing such wife or husband to be alive, if solemnized in this state, shall be absolutely void without any decree of divorce or other legal process." Gen. St. N. H. 1867,

c. 163, § 1. That provision clearly does not extend to a case in which the former wife, having obtained a divorce from the bond of matrimony, was absolutely freed from all obligation to the husband, and in which, as observed by Mr. Justice Wilde, in a like case, "notwithstanding the restraints imposed on the husband, he being the guilty cause of the divorce, the dissolution of the marriage contract was total, and not partial." Commonwealth v. Putnam, 1 Pick. 136, 139.[10] The marriage in New Hampshire must therefore be taken to have been valid by the law of that state.

The question presented by the report is therefore reduced to this: If a man who has been lawfully married in this Commonwealth, and whose wife has obtained a divorce a vinculo here because of his adultery, so that he is prohibited by our statutes from marrying again without leave of this court, is married, without having obtained leave of the court, and being still a resident of this Commonwealth, to another woman in another state, according to its laws, and afterwards cohabits with her in this Commonwealth, is his second marriage valid here?

The determination of this question depends primarily upon the construction of our statutes, but ultimately upon fundamental principles of jurisprudence, which have been clearly declared by the judgments of our predecessors in this court, and in the light of which those statutes must be read in order to ascertain their just extent and effect.

What marriages between our own citizens shall be recognized as valid in this Commonwealth is a subject within the power of the Legislature to regulate. But when the statutes are silent, questions of the validity of marriages are to be determined by the jus gentium, the common law of nations, the law of nature as generally recognized by all civilized peoples.

By that law, the validity of a marriage depends upon the question whether it was valid where it was contracted; if valid there, it is valid everywhere.

The only exceptions admitted by our law to that general rule are of two classes: 1st. Marriages which are deemed contrary to the law of nature as generally recognized in Christian countries; 2d. Marriages which the Legislature of the Commonwealth has declared shall not be allowed any validity, because contrary to the policy of our own laws.

The first class includes only those void for polygamy or for incest. To bring it within the exception on account of polygamy, one of the parties must have another husband or wife living. To bring it within the exception on the ground of incest, there must be such a relation between the parties contracting as to make the marriage incestuous

[10] Contra, if the decree of divorce itself remains incomplete at the time of the marriage. Warter v. Warter, L. R. 15 P. D. 152 (1890); McLennan v. McLennan, 31 Or. 480, 50 Pac. 802, 38 L. R. A. 863, 65 Am. St. Rep. 835 (1897). But see State v. Fenn, 47 Wash. 561, 92 Pac. 417 (1907).

according to the general opinion of Christendom; and, by that test, the prohibited degrees include, beside persons in the direct line of consanguinity, brothers and sisters only, and no other collateral kindred. Wightman v. Wightman, 4 Johns. Ch. (N. Y.) 343, 349–351. 2 Kent Com. 83. Story Confl. § 114. Sutton v. Warren, 10 Metc. 451. Stevenson v. Gray, 17 B. Mon. (Ky.) 193. Bowers v. Bowers, 10 Rich. Eq. (S. C.) 551, 73 Am. Dec. 99.[11]

A marriage abroad between persons more remotely related, not absolutely void by the law of the country where it was celebrated, is valid here, at least until avoided by a suit instituted for the purpose, even if it might have been so avoided in that country; and this is so, whether the relationship between the parties is one which would not make the marriage void if contracted in this Commonwealth, as in the case of a marriage between a widower and his deceased wife's sister, or one which would invalidate a marriage contracted here, as in the case of a marriage between aunt and nephew.

In Greenwood v. Curtis, 6 Mass. 358, 378, 379, 4 Am. Dec. 145, Chief Justice Parsons said: "If a foreign state allows of marriages incestuous by the law of nature, as between parent and child, such marriage could not be allowed to have any validity here. But marriages not naturally unlawful, but prohibited by the law of one state, and not of another, if celebrated where they are not prohibited, would be holden valid in a state where they are not allowed. As in this state a marriage between a man and his deceased wife's sister is lawful, but it is not so in some states; such a marriage celebrated here would be held valid in any other state, and the parties entitled to the benefits of the matrimonial contract." This distinction was approved by Chancellor Kent and by Judge Story. 2 Kent Com. 85, note a. Story Confl. § 116.

In The Queen v. Wye, 7 A. & E. 761, 771; s. c. 3 N. & P. 6, 13, 14; it was decided that the marriage of a man with his mother's sister in England before the St. of 5 & 6 Will. IV. c. 54, though voidable by process in the ecclesiastical courts, was, until so avoided, valid for all civil purposes, including legitimacy and settlement. In accordance with that decision, it was held in Sutton v. Warren, 10 Metc. 451, that such a marriage contracted in England, and never avoided there, must, upon the subsequent removal of the parties to Massachusetts, and the question arising collaterally in an action at common law, be deemed valid here, although, if contracted in this Commonwealth, it would have been absolutely void.

A marriage which is prohibited here by statute, because contrary to the policy of our laws, is yet valid if celebrated elsewhere according to the law of the place even if the parties are citizens and residents of this Commonwealth, and have gone abroad for the purpose of evading our laws, unless the Legislature has clearly enacted that such mar-

[11] But see U. S. v. Rodgers (D. C.) 109 Fed. 886 (1901).

riages out of the state shall have no validity here. This has been repeatedly affirmed by well considered decisions.

For example, while the statutes of Massachusetts prohibited marriages between white persons and negroes or mulattoes, a mulatto and a white woman, inhabitants of Massachusetts, went into Rhode Island, and were there married according to its laws, and immediately returned into Massachusetts; and it was ruled by Mr. Justice Wilde at the trial, and affirmed by the whole court, that the marriage, even if the parties went into Rhode Island to evade our laws, yet, being good and valid there, must upon general principles be so considered here, and that the wife therefore took the settlement of her husband in this Commonwealth. Medway v. Needham, 16 Mass. 157, 8 Am. Dec. 131.[12]

So it has been held that a man, from whom his wife had obtained in this state a divorce a vinculo for his adultery, which by our statutes disabled him from contracting another marriage, might lawfully marry again in another state according to its laws; that the children of such marriage took the settlement of their father in this Commonwealth; and that the new wife was entitled to dower in his lands here, even if the wife as well as the husband was domiciled here, and knew of the previous divorce and its cause, and went into the other state to evade our laws—so long as our statutes did not declare a marriage contracted there with such intent to be void here. West Cambridge v. Lexington, 1 Pick. 506, 11 Am. Dec. 231. Putnam v. Putnam, 8 Pick. 433. See also Dickson v. Dickson, 1 Yerg. (Tenn.) 110, 24 Am. Dec. 444; Ponsford v. Johnson, 2 Blatchf. C. C. 51, Fed. Cas. No. 11,266; 2 Kent. Com. 91–93.

The principles upon which these decisions proceeded were recognized in all the English cases decided before the American Revolution, although it is true, as has since been pointed out, that the particular question in each of them related rather to the forms required than to the capacity of the parties. * * *

In a recent case in the House of Lords, the cases of Medway v. Needham, 16 Mass. 157, 8 Am. Dec. 131, and Sutton v. Warren, 10 Metc. 451, above cited, have been severely criticized, and pointedly denied to be law. Brook v. Brook, 9 H. L. Cas. 193; s. c. 3 Sm. & Giff. 481. * * *

In Brook v. Brook, ubi supra, a widower and the sister of his deceased wife, being lawfully domiciled in England, while on a temporary visit to Denmark, had a marriage solemnized between them, which was by the laws of Denmark lawful and valid to all intents and purposes whatsoever. In a suit in equity, brought after the death of both parties to ascertain the rights of the children in their father's property, the House of Lords, in accordance with the opinions of

[12] Contra, on the ground of public policy, Kinney v. Commonwealth, 30 Grat. (Va.) 858, 32 Am. Rep. 690 (1878).

Lords Campbell, Cranworth, St. Leonards and Wensleydale, and affirming a decree rendered by Vice Chancellor Stuart, assisted by Mr. Justice Cresswell, held that the marriage in Denmark was wholly void by the St. of Will. IV.,[13] and that the children of that marriage were bastards.

The decision was put, by the learned judges who concurred in it, upon three different grounds.

The first ground was that the St. of Will. IV. disqualified English subjects everywhere from contracting such a marriage. This ground was taken in the court below, and by Lord St. Leonards in the House of Lords. 3 Sm. & Giff. 522, 525. 9 H. L. Cas. 234–238. But it was expressly disclaimed by Lord Campbell, Lord Cranworth and Lord Wensleydale, the two former of whom expressed opinions that the statute did not extend to all the colonies, and all three declared that they did not think its purpose was to put an end to such marriages by British subjects throughout the world. 9 H. L. Cas. 214, 222, 240.

The second ground, which was suggested by Mr. Justice Cresswell and Lord Wensleydale only, and is opposed to all the American authorities, was that the case justly fell within the first exception, stated in Story Confl. § 114, of marriages involving polygamy and incest. 3 Sm. & Giff. 513. 9 H. L. Cas. 241, 245. In view of that position, it may be observed that in an earlier case, in which Lord Wensleydale himself (then Baron Parke) delivered the opinion, a marriage of a widower with his deceased wife's sister, before the St. of Will. IV., was prevented from being made irrevocable by that statute, only by the institution, a week before its passage, of a suit for nullity in the Ecclesiastical Court by the father of the supposed wife; and by the decision of the Privy Council, that because, if the marriage was not set aside, the birth of a child of the marriage would impose a legal obligation upon the grandfather to maintain the child in the event of its being poor, lame or impotent, and unable to work, he had, according to the rules of the ecclesiastical courts, a sufficient interest, "although of an extremely minute and contingent character," to support such a suit. Sherwood v. Ray, 1 Moore P. C. 353, 401, 402.

The third ground, upon which alone all the law lords agreed, was that the St. of Will. IV. made all future marriages of this kind between English subjects, having their domicile in England, absolutely void, because declared by act of Parliament to be contrary to the law of God, and must therefore be deemed to include such marriages, although solemnized out of the British dominions.

The law of England, as thus declared by its highest legislative and judicial authorities, is certainly presented in a remarkable aspect. 1st. Before the St. of Will. IV. marriages within the prohibited degrees of

[13] St. 5 & 6 Will. IV, c. 54, commonly known as "Lord Lyndhurst's Act," provided that marriages between persons within the prohibited degrees of affinity, thereafter celebrated, should be absolutely null and void.

affinity, if not avoided by a direct suit for the purpose during the lifetime of both parties, had the same effect in England, in every respect, as if wholly valid. 2d. This statute itself made such marriages, already solemnized in England, irrevocably valid there, if no suit to annul them was already pending. 3d. It left such marriages in England, even before the statute, to be declared illegal in the Scotch courts, at least so far as rights in real estate in Scotland were concerned. 4th. According to the opinion of the majority of the law lords, it did not invalidate marriages of English subjects in English colonies, in which a different law of marriage prevailed. 5th. But it did make future marriages of this kind, contracted either in England, or in a foreign country, by English subjects domiciled in England, absolutely void, because declared by the British Parliament to be contrary to the law of God.

The judgment proceeds upon the ground that an act of Parliament is not merely an ordinance of man, but a conclusive declaration of the law of God; and the result is that the law of God, as declared by act of Parliament and expounded by the House of Lords, varies according to time, place, length of life of parties, pecuniary interests of third persons, petitions to human tribunals, and technical rules of statutory construction and judicial procedure.

The case recalls the saying of Lord Holt, in London v. Wood, 12 Mod. 669, 687, 688, that "an act of Parliament can do no wrong, though it may do several things that look pretty odd;" and illustrates the effect of narrow views of policy, of the doctrine of the "omnipotence of Parliament," and of the consequent unfamiliarity with questions of general jurisprudence, upon judges of the greatest vigor of mind, and of the profoundest learning in the municipal law and in the forms and usages of the judicial system of their own country.

Such a decision, upon such reasons, from any tribunal, however eminent, can have no weight in inducing a court, not bound by it as authority, to overrule or disregard its own decisions.

The provision of the Gen. St. c. 107, § 25, forbidding the guilty party to a divorce to contract another marriage, during the life of the other party, without leave of this court, on pain of being adjudged guilty of polygamy, does not create a permanent incapacity, like one arising from consanguinity or affinity. It is rather in the nature of the imposition of a penalty, to which it would be difficult to give an extra-territorial operation. West Cambridge v. Lexington, 1 Pick. 506, 510, 512, 11 Am. Dec. 231. Clark v. Clark, 8 Cush. 385, 386. Upon the principles and authorities stated in the earlier part of this opinion it certainly cannot invalidate a subsequent marriage in another state according to its laws, at least without proof that the parties went into that state and were married there with the intent to evade the provisions of the statutes of this Commonwealth. No such intent being shown in this case, we need not consider its effect, if proved, nor

whether the indictment is in due form. See Commonwealth v. Putnam, 1 Pick. 136, 139; Commonwealth v. Hunt, 4 Cush. 49.

New trial ordered.[14]

PENNEGAR v. STATE.

(Supreme Court of Tennessee, 1889. 87 Tenn. 244, 10 S. W. 305, 2 L. R. A. 703, 10 Am. St. Rep. 648.)

FOLKES, J. The defendants were indicted for lewdness, tried and convicted, and have appealed in error to this court. The record discloses the following facts: E. N. Haney was divorced from her husband, John Haney, by a decree of the circuit court of De Kalb county, upon the petition of the husband, charging her with adultery with William Pennegar. The decree adjudges the charge fully proven, and the divorce was granted the husband solely upon such charge. The divorced wife and the partner in her guilt shortly after the divorce went to Jackson county, state of Alabama, where they were married to each other, and on the next day after their marriage returned to De Kalb county, in this state, the place of their former and present residence, where they have been living and cohabiting openly and publicly, as man and wife, all within 12 months before the indictment found in this case; the divorced husband, John Haney, still living.

Section 3332, Milliken & V. Code, enacts: "When a marriage is absolutely annulled, the parties shall, severally, be at liberty to marry again; but a defendant who has been guilty of adultery shall not marry the person with whom the crime was committed, during the life of the former husband or wife." The marriage, being prohibited by statute, is void, if solemnized in this state. 1 Bish. Mar. & Div. §§ 46, 223; Carter v. Montgomery, 2 Tenn. Ch. 225; Owen v. Bracket, 7 Lea, 448. In the last case cited this court held the woman not entitled to homestead where the marriage was had in this state in violation of the statute quoted above. It is admitted that there is nothing in the laws of Alabama prohibiting the guilty divorced party from marrying the paramour. The question, therefore, presented in this record is whether citizens of this state, prohibited by the statute referred to from marrying, can, by crossing over into a sister state, where such marriages are not inhibited, claim the benefit of the marriage there contracted, when they return at once to this state, having left it for the manifest purpose of evading our statute. The question is of first impression in this state, and one not free from difficulty, by reason of certain well-established principles, universally recognized in the law of marriage, which apparently would sustain such marriage, chief of which is that which says: "A marriage, valid where solemnized,

[14] See, also, Scott v. Attorney General, L. R. 11 P. D. 128 (1886); Mock v. Chaney, 36 Colo. 60, 87 Pac. 538 (1906).

is valid everywhere." Adjudged cases are to be found which, under the supposed application of this rule, have sustained marriages identical with the one at bar in all of its essential facts, while others of equal respectability have reached a different result; to some or both of which we will refer later on. Before doing so, let us see what are the general principles controlling in cases of this character. Marriage is an institution recognized and governed to a large degree by international law, prevailing in all countries, and constituting an essential element in all earthly society. The well-being of society, as it concerns the relation of the sexes, the legitimacy of offspring, and the disposition of property, alike demand that one state or nation shall recognize the validity of marriage had in other states or nations, according to the laws of the latter, unless some positive statute or pronounced public policy of the particular state demands otherwise. It may be said, therefore, to be a rule of universal recognition in all civilized countries that in general a marriage valid where celebrated is valid everywhere. We say "in general," because there are exceptions to the rule as well established as the rule itself. These exceptions or modifications of the general rule may be classified as follows: First, marriages which are deemed contrary to the law of nature, as generally recognized in Christian countries; second, marriages which the local law-making power has declared shall not be allowed any validity, either in express terms or by necessary implication. To the first class belong those which involve polygamy and incest; and in the sense in which the term "incest" is used, are embraced only such marriages as are incestuous according to the generally accepted opinion of Christendom, which relates only to persons in direct line of consanguinity, and brothers and sisters. The second class, i. e., those prohibited in terms by the statute, presents difficulties that are not always easy of solution, and have led to conflicting decisions. This class may be subdivided into two classes: First, where the statutory prohibition relates to form, ceremony, and qualification, it is held that compliance with the law of the place of marriage is sufficient, and its validity will be recognized, not only in other states generally, but in the state of the domicile of the parties, even where they have left their own state to marry elsewhere, for the purpose of avoiding the laws of their domicile. Instead of being called a subdivision of the second class of exceptions, it would be more accurate to say that it is an exception to the exception, and falls within the operation of the general rule first announced, of "valid where performed, valid everywhere." To the second subdivision of the second class of exceptions belong cases which, prohibited by statute, may or may not embody distinctive state policy, as affecting the morals or good order of society.

It is not always easy to determine what is a positive state policy. It will not do to say that every provision of a statute prohibiting marriage, under certain circumstances, or between certain parties, is indicative of a state policy in the sense in which it is used in this connection.

To so hold would be to overturn this most solemn relation, involving legitimacy of offspring, homestead dower, and the rights of property, in the face of the conclusions of approved text writers, and the concurrence of the adjudications in numerous cases, relating not only to forms or ceremonies and qualifications of the parties, but also to prohibited degrees of relationship, not incestuous in the common opinion of Christian countries, and relating to marriages between persons of different race and color. Each state or nation has ultimately to determine for itself what statutory inhibitions are by it intended to be imperative, as indicative of the decided policy of the state concerning the morals and good order of society, to that degree which will render it proper to disregard the jus gentium of "valid where solemnized, valid everywhere." The legislature has, beyond all possible question, the power to enact what marriages shall be void in its own state, notwithstanding their validity in the state where celebrated, whether contracted between parties who were in good faith domiciled in the state where the ceremony was performed, or between parties who left the state of domicile for the purpose of avoiding its statutes, when they come or return to the state; and some of the states have in terms legislated on the subject. Where, however, the legislature, as in our own state, has not deemed it proper or necessary to provide in terms what shall be the fate of a marriage valid where performed, but has in the particular case contented itself with merely prohibiting such marriages, the duty is devolved upon the courts of determining, from such legislation as is before it, whether the marriage in the other state is valid or void when the parties come into this state.

If, as we have seen, the statutory inhibition relates to matters of form or ceremony, and in some respects to qualification of the parties, the courts would hold such marriage valid here; but if the statutory prohibition is expressive of a decided state policy as a matter of morals, the courts must adjudge the marriage void here, as contra bonos mores. Thus, in State v. Bell, 7 Baxt. 9, 32 Am. Rep. 549, this court held that a marriage between a white person and a negro, valid in Mississippi, where celebrated, was void here, in a case where the parties were domiciled in Mississippi at the time of the marriage. This case is distinguishable from the case at bar, not only by reason of the domicile in Mississippi, but also in that we have a highly penal statute on the subject of marriages between whites and blacks, passed in 1870, in amendment of the act which prohibited such marriage theretofore, and by the very pronounced convictions of the people of this state as to the demoralization and debauchery involved in such alliances. The decision in the above case is so manifestly in keeping with sound principles now well established that it need not be here fortified by citation of authority; but we pause to call attention to a case relied on by counsel for defendants, holding not only that such a marriage, solemnized in Rhode Island, (where it was legal,) between persons domiciled there, would be valid in Massachusetts, but that it was valid in

the latter state where the parties had left Massachusetts, and gone into Rhode Island, for the express purpose of evading the Massachusetts law prohibiting such marriage, and returned to Massachusetts. Medway v. Needham, 16 Mass. 157, 8 Am. Dec. 131. This was certainly carrying the doctrine of "valid where performed, valid everywhere," to an extreme limit. The case has been much criticised,—more so, indeed, than it deserves, as it seems to us; for while, to our mind, the result is startling, it is not out of harmony, in its argument, with the principles we have stated. The learned judge delivering the opinion, in speaking of the exception to the general rule, says: "Motives of policy may likewise be admitted into consideration of the extent to which this exception is to be allowed to operate. If without any restriction, then it might be that incestuous marriages might be contracted between citizens of a state where they were held unlawful and void, in countries where they were not prohibited, and the parties return to live in defiance of the religion and laws of their own country. But it is not to be inferred from a toleration of marriages which are prohibited merely on account of political expediency, that others, which would tend to outrage the principles and feelings of all civilized nations, would be countenanced." So that the difference between this case and State v. Bell, 7 Baxt. 9, 32 Am. Rep. 549, is a difference in the "motives of policy" and ideas of "political expediency." We do not think, therefore, that the case is open to the criticism passed upon it by the lord chancellor in Brook v. Brook, 9 H. L. Cas. 193, which case is itself, with equal propriety, criticised by Gray, C. J., in Com. v. Lane, 113 Mass. 458, 18 Am. Rep. 509, which contains a very able and elaborate review of the subject under consideration. Though unable to concur in some of the arguments, and especially with the dictum that "a marriage which is prohibited here by statute, because contrary to the policy of our laws, is yet valid if celebrated elsewhere, according to the law of the place, even if the parties are *citizens and residents of this commonwealth, and have gone abroad for the purpose of evading our laws, unless the legislature has clearly enacted that such marriages out of the state shall have no validity here.*" Of course we refer to so much of the above as we have italicised, for it is the purest dictum; it being a case where there was no proof of an intent to evade the laws of Massachusetts, as is shown by the judge himself, who concludes his opinion as follows: "Upon the principles and authorities stated in the earlier part of this opinion, it certainly cannot invalidate a subsequent marriage in another state, according to its laws, at least without proof that the parties went into that state, and were married there, with the intent to evade the provisions of the statutes of this commonwealth. No such intent being shown in this case, we need not consider its effect, if proved, nor whether the indictment was in due form." This case being an indictment for polygamy, where a wife, having obtained a divorce on account of the husband's adultery, (in which case he was prohibited from marrying again

without leave of the court,) the husband married another woman in another state without proof that the second wife ever resided in Massachusetts prior to her marriage, and without proof of a purposed evasion of the Massachusetts law.

Recurring for a moment to Medway v. Needham, it may well be that, recognizing and applying the same general principles, the courts in different states may reach different results in the same class of cases, according as the general and fixed sentiment of the public in the respective states may differ in matters of public policy, and, if not, of "political expediency." What might be deemed a mere regulation in one state might be regarded as a matter vitally affecting the morals and good order of society in another; so that what is pointed out as a reproach to the law by reason of the conflict in the reported cases from different states and nations is in fact evidence of the universality of the general principles recognized as fundamental by all enlightened courts; the different results reached being due to the statutory enactments of the different states as construed by courts thereof, who interpret the meaning, intent, and scope of each particular statute on the subject of marriage in the light of the known policy of the state, deviating from the general principles of the international law of marriage only so far as they are constrained to do so by the terms of legislative enactments, or by the manifest and distinctive policy of the state, as understood by the courts. Now, believing, as we do, that the statute in question, which we are called upon to construe in the case at bar, is expressive of a decided state policy not to permit the sensibilities of the innocent and injured husband or wife, who has been driven by the adultery of his or her consort to the necessity of obtaining a divorce, to be wounded, nor the public decency to be affronted, by being forced to witness the continued cohabitation of the adulterous pair, even under the guise of a subsequent marriage performed in another state for the purpose of avoiding our statute, and believing that the moral sense of the community is shocked and outraged by such an exhibition, we will not allow such parties to shield themselves behind a general rule of the law of marriage, the wisdom and perpetuity of which depends as much upon the judicious exceptions thereto, as upon the inherent right of the rule itself.

After what has been already said in the earlier part of this opinion, it is doubtless unnecessary to say that in reaching the conclusion just announced we do not intend in the slighest degree to encroach upon the principle which recognizes as valid marriages had in other states where the parties have gone to such other states for the purpose of avoiding our own laws in matters of form, ceremony, or qualification merely; but, confining ourselves to the facts of this case, we hold that where citizens of this state withdraw temporarily to another state, and there marry, for the purpose and with the intent of avoiding the statute in question, passed in pursuance of a determined policy of the state, in the interest of public morals, peace, and good order of society,

such parties, upon their return to this state, and cohabiting as man and wife, are liable to indictment in the courts of this state for lewdness.

The case of Dickson v. Dickson, 1 Yerg. (Tenn.) 110, 24 Am. Dec. 444, has no concern with the point adjudged in the case at bar. That case merely decides that a person divorced in Kentucky for adultery, and not by the laws of that state permitted to marry again, might contract a valid marriage in this state prior to the act of 1835, which for the first time prohibited such marriages; and, having come to this state in good faith, married, and continued to reside here up to the time of her husband's death, she was held entitled to dower. The only instruction to be drawn from this case is that, notwithstanding our statute, these parties might have contracted a marriage in Alabama, where there is no similar statute, had they removed there in good faith, which would be valid in that state.

Putnam v. Putnam, 8 Pick. (Mass.) 433, is a case deciding directly contrary to the conclusion we have reached, and the facts in that case were identical with this. It is extremely brief, is unsatisfactory to us from every point of view, and is predicated entirely upon the case of Medway v. Needham, 16 Mass. 157, 8 Am. Dec. 131, decided 10 years before, which the court said was "binding upon us and the community until the legislature shall see fit to alter it." While speaking of Medway v. Needham, the opinion continues: "The court were aware of all the objections to the doctrine in that case, and knew it to be vexata quæstio among civilians; but they adopted the rule of the law of England on this subject, on the same ground it was adopted there, namely, the extreme danger and difficulty of vacating a marriage which, by the laws of the country where it was entered into, was valid." It is manifest that the effort to fortify Medway v. Needham by assuming that it is based on the law of England must fail if the house of lords are competent to testify as to the state of the law in England on the subject, for we find that in Brook v. Brook, 9 H. L. Cas. 219, the lord chancellor, in speaking of the case of Medway v. Needham, as we have already seen, says: "It is entitled to but little weight, and is based upon decisions which relate to form and ceremony of marriage;" and adds: "If a marriage is absolutely prohibited in any country as being contrary to public policy, and leading to social evils, I think that the domiciled inhabitants in that country cannot be permitted, by passing the frontier, and entering another state in which the marriage is not prohibited, to celebrate a marriage forbidden by their own state, and, immediately returning to their own state, to insist on their marriage being recognized as lawful." This is, in our opinion, the true doctrine, and we have quoted so much to show that the highest English court does not hold to the principle upon which it is claimed by the Massachusetts court the Medway Case is based. But with due deference we must be permitted to say that the decision in the case of Brook v. Brook goes further

than we think the principle announced requires,—further at least than we would be inclined to go,—when, as was done in that case, it was held that, while both were resident in England, the man marrying his deceased wife's sister in Denmark, where such marriage was legal, and returning to England, the marriage was void there, because a marriage between parties so related was contrary to the laws of England. Such a marriage would, we think, not fall within any of the exceptions to the general rule. It certainly cannot be said to be incestuous in the estimation of Christendom, and it would seem that under the policy of many of the states of this Union such a marriage is not immoral, nor tending to any social evil affecting the welfare of society. But, after all, it must be admitted that it was for that court to determine whether or not the law infringed was indicative of a decided and essential public policy in England; and the courts of that country would doubtless be as slow to approve our estimate of the public policy which condemns the marriage of the divorced adulterer, since the clause prohibiting such marriage was, upon the argument of Lord Palmerston, that the guilty party was preserved from ruin by such a marriage, stricken from the divorce bill in the house of commons, as we are to accept their opinion that a marriage between a man and his deceased wife's sister is contrary to good morals.

We return for a moment to Putnam v. Putnam, supra, to note that the court in this case closes its opinion with this language: that "if it shall be found *inconvenient* or repugnant to *sound principles* [the italics are ours] it may be expected that the legislature will explicitly enact that marriages contracted within another state, which, if entered into here, would be void, shall have no force within this commonwealth." The legislature did shortly thereafter so enact; whether because the doctrine laid down in the case was inconvenient, or because repugnant to sound principle, does not appear. In our view of the law, both considerations might well have moved the legislature. Stevenson v. Gray, 17 B. Mon. (Ky.) 193, is a case holding the doctrine of Putnam v. Putnam, and, after what we have said about the latter case, need not be further noticed here.

Van Storch v. Griffin, 71 Pa. 240, does not sustain the contention of counsel on the point decided, as there is nothing in the case to show that the parties went from one state to the other for the purpose of evading the laws of the one. It merely holds that the decree of divorce in New York, which forbade the respondent from marrying again during the life of the libelant, had no extraterritorial effect; so that what is said in the opinion about going from one state to the other for the purpose of evading the law of the state granting the divorce is dictum, pure and simple.

In full accord with the conclusion we have reached in the case at bar is Kinney v. Com., 30 Grat. (Va.) 858, 32 Am. Rep. 690, where it was held that a marriage between a negro and a white person, had in the District of Columbia, for the purpose of evading the law of Vir-

ginia, was void upon their return. To the same effect, see State v. Kennedy, 76 N. C. 251, 22 Am. Rep. 683; Scott v. State, 39 Ga. 321; Dupre v. Boulard, 10 La. Ann. 411. The intention to evade the law by going into another state was made the test of its validity in North Carolina, as will be seen by reference to the two cases of State v. Kennedy, 76 N. C. 251, 22 Am. Rep. 683, above cited, and State v. Ross, 76 N. C. 242, 22 Am. Rep. 678,—both marriages between a white person and a negro. In Kennedy's Case, such intention being shown, the marriage was held void; while in Ross' Case, it being shown that there was no intent to return to North Carolina, though the parties afterward did so, the defendant was held not guilty of fornication. This was, however, by a divided court, and is contrary to our own case of State v. Bell, 7 Baxt. 9, 32 Am. Rep. 549.

We conclude this opinion, already too long, by a reference to Williams v. Oates, 27 N. C. 535, where Chief Justice Ruffin, in delivering the opinion of the court in a case very similar to our own, says: "Now, if the law of South Carolina allow of such a marriage, and although it be true that generally marriages are to be judged by the lex loci contractus, yet every country must so far respect its own laws and their operation on its own citizens as not to allow them to be evaded by acts in another country, purposely to defraud them." See, also, Whart. Confl. Laws, §§ 135, 181, 182.

Let the judgment of the circuit court be affirmed.[15]

[15] Accord: In re Stull's Estate, 183 Pa. 625, 39 Atl. 16, 39 L. R. A. 539, 63 Am. St. Rep. 776 (1898). Contra: Van Voorhis v. Brintnall, 86 N. Y. 18, 40 Am. Rep. 505 (1881).

It was held in Newman v. Kimbrough, 59 S. W. 1061, 52 L. R. A. 668 (1900), by the Court of Chancery Appeals of Tennessee, affirmed orally by the Supreme Court of that state, that such a marriage would be void, although the parties had not gone to the state where the marriage was celebrated for the purpose of evading the law of the forum. See, in general, 60 Am. St. Rep. 941–947; 57 L. R. A. 169–171.

A marriage valid under the lex loci et domicilii may be denied recognition on the ground that it does not conform to the notion of a "Christian" marriage. Hyde v. Hyde [1866] L. R. 1 P. & D. 130. See Wharton, Conflict of Laws, § 131a.

As to Indian marriages, see Wall v. Williamson, 8 Ala. 48 (1844); Earl v. Godley, 42 Minn. 361, 44 N. W. 254, 7 L. R. A. 125, 18 Am. St. Rep. 517 (1890); Roche v. Washington, 19 Ind. 53, 81 Am. Dec. 376 (1862).

As to law governing the essentials of a marriage, see, in general, 57 L. R. A. 159–173; Bishop on Marriage, Divorce and Separation, §§ 841–906.

CONTINENTAL LAW.—(a) FORM.—The rule "locus regit actum" governs. *France*, Art. 170, Civ. Code (see, also, article 171, Civ. Code); App. Douai, Dec. 5, 1904 (2 Darras, 189); App. Douai, Nov. 18, 1903 (S. 1906, 1, 161). *Germany*, Art. 11, Law Intr. Civ. Code. *Italy*, Art. 9, Prel. Disp. Civ. Code; Arts. 100–101, Civ. Code; Cass. Palermo, Aug. 5, 1905 (34 Clunet, 849). It is sufficient, however, if the form required by the national law be observed. *Germany*, Art. 11, Law Intr. Civ. Code. *Italy*, Art. 9, Prel. Disp. Civ. Code. Certain exceptions to the rule "locus regit actum" exist. In Germany no marriage can be celebrated except according to the form prescribed by German law. Article 13, Law Intr. Civ. Code. In France it is established law that, if Frenchmen resort to another jurisdiction for the purpose of evading French law, the marriage will not be recognized, notwithstanding it was celebrated in accordance with the formal requirements of the local law.

SECTION 2.—DIVORCE.

LE MESURIER v. LE MESURIER.

(Judicial Committee of the Privy Council, 1895. L. R. App. Cas. 517.)

Appeal from the Supreme Court of Ceylon dismissing appellant's libel for divorce on the ground of lack of jurisdiction. Appellant was an Englishman by birth and at the time when this action was instituted retained his English domicil of origin. The marriage with the respondent, a Frenchwoman, had taken place in England. Their principal residence from the date of their marriage until the commencement of this suit had been in Ceylon, but neither was domiciled there. None of the respondents except the wife were residents of Ceylon and none of the matrimonial offenses charged had been committed within the jurisdiction of the courts of Ceylon.[16]

Cass. July 5, 1905 (33 Clunet, 1145); Cass. Jan. 3, 1906 (S. 1906, 1, 142); Trib. 1st Inst. Tunis, Feb. 27, 1907 (35 Clunet, 496).

The above rules are subject to the provisions of the Convention of the Hague of June 12, 1902. See Appendix A, I.

A defect of form may be cured by a "possession d'état," i. e., the general and public reputation of having a certain status. See article 196, French Civ. Code, with annotations thereto by Sirey, "Les Codes Annotés." Compare Trib. Civil Seine, March 5, 1907 (35 Clunet, 814). So, *Italy*, Art. 119, Civ. Code.

(b) ESSENTIALS.—*France.*—The national law of the parties governs. Art. 3, Civ. Code. So as to consent of parents. App. Besançon, Jan. 4, 1888 (D. 1889, 2, 69). So as to necessity of a religious ceremony. Trib. Civ. Seine, April 28, 1906 (2 Darras, 751); Trib. Civ. Seine, Nov. 25, 1907 (4 Darras, 242). So as to grounds for which a marriage may be annulled. Trib. 1st Inst. Tunis, Nov. 27, 1907 (35 Clunet, 811). But if the parties possess different nationalities, a suit to annul a marriage on the ground that such a religious ceremony was omitted can be brought only by the party whose national law was violated. Trib. Civ. Seine, Feb. 14, 1908 (35 Clunet, 813).

As to putative marriages, see articles 201, 202, Civ. Code; App. Bordeaux, Feb. 5, 1883 (S. 1883, 2, 137); App. Alger, June 28, 1887 (D. 1889, 2, 78).

Germany.—If either party is a German, or if a marriage between foreigners is contracted in Germany, each party is governed by his or her national law (article 13, Law Intr. Civ. Code), subject, however, to renvoi (article 27). See, also, J. Keidel, Le droit international privé dans le nouveau Code Civil Allemand, 26 Clunet, 30–39.

Italy.—The national law of each of the parties applies. Article 102, Civ. Code; App. Lucca, April 17, 1891 (Annali 1891, 2, 310); App. Florence, Aug. 7, 1907 (La Legge 1907, 230). But a foreigner marrying in Italy is subject to all the restrictions established by articles 55–69 of the Civil Code. Article 102, Civ. Code; App. Ancona, March 12, 1884 (Foro It. 1884, 1, 574). See, also, P. Fiore, Du mariage célébré à l'étranger suivant la législation italienne, 13 Clunet, 161–177, 299–312; 14 Clunet, 46–54, 154–161.

The above rules are subject to the provisions of the Convention of the Hague of June 12, 1902. See Appendix A, I. See, also, Baligand, Der räumliche Geltungsbereich der Rechtsätze über den Ehevertrag, 17 Niemeyer, 202–223; E. Bettelheim, Das internationale Eherecht nach der Haager Konvention, 17 Niemeyer, 597–645; Maurice Sicorè, Le droit de contracter mariage d'après la convention de la Haye du 12 Juin, 1902, 34 Clunet, 1010–1016; G. C. Buzzati, Tratado di diritto internazionale privato secondo le convenzioni dell' Aja, Vol. I, Introduzione, Il matrimonio (1908).

[16] This statement of facts has been substituted for that of the original report.

Lord WATSON. [After examining the English and Scotch authorities upon the subject, the learned justice continued as follows:]

When carefully examined, neither the English nor the Scottish decisions are, in their Lordships' opinion, sufficient to establish the proposition that, in either of these countries, there exists a recognised rule of general law, to the effect that a so-called matrimonial domicil gives jurisdiction to dissolve marriage.

Tollemache v. Tollemache, 1 Sw. & Tr. 557, which was decided by three judges in 1859, shortly after the passing of the Divorce Act, appears to be an authority to the contrary. The learned judges sustained the jurisdiction of the English Court, which was the forum of the husband's domicil, and disregarded as incompetent a decree of the Court of Session dissolving his marriage, although he had a matrimonial domicil in Scotland, where he had bona fide resided for four years with his wife, neither casually nor as a traveler. Then in Brodie v. Brodie, 2 Sw. & Tr. 259, in the year 1861, three learned judges decided the opposite, holding that residence of that kind, which had been found in Tollemache v. Tollemache, 1 Sw. & Tr. 557, to be sufficient to give jurisdiction to a Scottish Court where the domicil was English, was nevertheless sufficient to give jurisdiction to themselves where the domicil was Australian. In Wilson v. Wilson, L. R. 2 P. & D. 435, jurisdiction was sustained by Lord Penzance upon the ground that the petitioner had acquired an English domicil, with an expression of opinion by his Lordship that such domicil ought to be the sole ground of jurisdiction to dissolve marriage. In Niboyet v. Niboyet, 4 P. D. 1, Sir Robert Phillimore expressed a similar opinion, and dismissed the suit of the petitioner, who had a matrimonial domicil in England which fully answered the definition of such domicil given either in Brodie v. Brodie, 2 Sw. & Tr. 259, or in Pitt v. Pitt, 1 Court of Sess. Cas., 3rd Series, 106; 4 Macq. App. Cas. 627. His decision was, no doubt, reversed in the Court of Appeal; but it had the support of the present Master of the Rolls, and their Lordships have already pointed out that the judgment of the majority was mainly, if not altogether, based upon a reason which will not bear scrutiny.

The Scottish decisions appear to their Lordships to be equally inefficient to show that a matrimonial domicil is a recognised ground of divorce jurisdiction. So far as they go, they are consistent enough, but the doctrine appears to have had a very brief existence, because the three cases in which it was applied all occurred between the 7th of February and the 14th of December in the year 1862. Although, owing to the course taken by the appellant's counsel in Pitt v. Pitt, 1 Court Sess. Cas., 3rd Series, 106; 4 Macq. App. Cas. 627, the House of Lords had not an opportunity of expressly deciding the point, there can be little doubt that the approval of the course adopted by counsel, which was openly expressed by Lord Westbury, has had the effect of discrediting the doctrine in Scotland; and it is impossible to affirm that the Court of Session would now give effect to it. The

eminent judge who, in 1862, was the first to give a full and clear exposition of the doctrine of matrimonial domicil, spoke of it, in the year 1882, not as a doctrine accepted in the law of Scotland, but as matter of speculation.

It is a circumstance not undeserving of notice that the learned judges, whether English or Scottish, who have expressed judicial opinions in favor of a matrimonial domicil, have abstained from reference to those treatises on international law which are generally regarded as authoritative, in the absence of any municipal law to the contrary. The reason for their abstinence is probably to be found in the circumstance that nothing could be extracted from these sources favorable to the view which they took. Their Lordships are of opinion that in deciding the present case, on appeal from a Colony which is governed by the principles of the Roman-Dutch law, these authorities ought not to be overlooked.

Huber (Lib. 1, titl. 3, § 2, De Confl. Leg.) states the rule of international law in these terms: "Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium praejudicetur." That passage was cited with approbation by Lord Cranworth and Lord Westbury in Shaw v. Gould, L. R. 3 H. L. 72, 81. To the same effect, but in language more pointed, is the text of Rodenburg (De Stat. Divers. tit. 1, c. 3, § 4) cited in the same case by Lord Westbury: "Unicum hoc ipsa rei natura ac necessitas invexit, ut cum de statu et conditione hominum quaeritur, uni solummodo Judici, et quidem Domicilii, universum in illa jus sit attributum." The same rule is laid down by Bar, the latest Continental writer on the theory and practice of international private law. He says (section 173, Gillespie's Translation, p. 382,) "that in actions of divorce—unless there is some express enactment to the contrary—the judge of the domicil or nationality is the only competent judge." And he adds: "A decree of divorce, therefore, pronounced by any other judge than a judge of the domicil or nationality, is to be regarded in all other countries as inoperative."

There can, in their Lordships' opinion, be no satisfactory canon of international law, regulating jurisdiction in divorce cases, which is not capable of being enunciated with sufficient precision to ensure practical uniformity in its application. But any judicial definition of matrimonial domicil which has hitherto been attempted has been singularly wanting in precision, and not in the least calculated to produce a uniform result. The definitions given in Brodie v. Brodie, 2 Sw. & Tr. 259, and in Pitt v. Pitt, 1 Court Sess. Cas. (3d Series) 106, 4 Macq. App. Cas. 627, appear to their Lordships to be equally open to that objection. Bona fide residence is an intelligible expression, if, as their Lordships conceive, it means residence which has not been resorted to for the mere purpose of getting a divorce which was not obtainable in the country of domicil. Residence which is "not that of a

traveler" is not very definite; but nothing can be more vague than the description of residence which, not being that of a traveler, is not to be regarded as "casual." So also, the place where it is the duty of the wife to rejoin her husband, if they happen to be living in different countries, is very indefinite. It may be her conjugal duty to return to his society although he is living as a traveler, or casually, in a country where he has no domicil. Neither the English nor the Scottish definitions, which are to be found in the decisions already referred to, give the least indication of the degree of permanence, if any, which is required in order to constitute matrimonial domicil, or afford any test by which that degree of permanence is to be ascertained. The introduction of so loose a rule into the jus gentium would, in all probability, lead to an inconvenient variety of practice, and would occasion the very conflict which it is the object of international jurisprudence to prevent.

Their Lordships attach great weight to the consideration that the theory of matrimonial domicil for which the appellant contends has never been accepted in the Court of last resort for England and Scotland. The matter does not rest there; because the theory is not only in direct opposition to the clear opinion expressed by Lord Westbury in Pitt v. Pitt, 1 Court Sess. Cas. (3d Series) 106, 4 Macq. App. Cas. 627, but appears to their Lordships to be at variance with the principles recognised by noble and learned Lords in Dolphin v. Robins, 7 H. L. C. 390, and in Shaw v. Gould, L. R. 3 H. L. 55. It is true that in these cases, and especially in Dolphin v. Robins, 7 H. L. C. 390, there was ground for holding that the spouses had resorted to a foreign country and a foreign tribunal in order to escape from the law and the Courts of their English domicil. But in both the international principle, upon which jurisdiction to dissolve a marriage depends, was considered and discussed; and the arguments addressed to their Lordships in favor of matrimonial domicil by the learned counsel for the appellant appear to them to be at variance with the weighty observations which were made by noble and learned Lords in these cases. In Dolphin v. Robins, 7 H. L. C. 390, Lord Cranworth stated that "it must be taken now as clearly established that the Scotch Court has no power to dissolve an English marriage, where, as in this case, the parties are not really domiciled in Scotland, but have only gone there for such a time as, according to the doctrine of the Scotch Courts, gives them jurisdiction in the matter." In Shaw v. Gould, L. R. 3 H. L. 55, the dicta of noble and learned Lords upon the point raised in this appeal were even more emphatic. Lords Cranworth and Westbury expressed their entire approval of the doctrine laid down by Huber and Rodenburg in those passages which have already been cited. Their Lordships did not go the length of saying that the Courts of no other country could divorce spouses who were domiciled in England; but they held that the Courts of England were not bound, by any principle of international law, to recognise as effectual the de-

cree of a foreign Court divorcing spouses who, at its date, had their domicil in England. The other noble and learned Lords who took part in the decision of Shaw v. Gould, L. R. 3 H. L. 55, were Lords Chelmsford and Colonsay. Lord Chelmsford did not express any opinion upon the subject of matrimonial domicil. Lord Colonsay rested his judgment upon the fact that the spouses had resorted to Scotland for the very purpose of committing a fraud upon the law of their English domicil; but he did indicate an opinion that, in the absence of such fraudulent purpose, they might possibly have obtained a divorce in Scotland, after a residence in that country which was insufficient to change their domicil of succession.

Their Lordships have in these circumstances, and upon these considerations, come to the conclusion that, according to international law, the domicil for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage. They concur, without reservation, in the views expressed by Lord Penzance in Wilson v. Wilson, L. R. 2 P. & D. 442, which were obviously meant to refer, not to questions arising in regard to the mutual rights of married persons, but to jurisdiction in the matter of divorce: "It is the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the Courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another."

Their Lordships will, therefore, humbly advise Her Majesty to affirm the order appealed from. The appellant must pay to the first and fourth respondents their costs of this appeal.[17]

[17] See, also, Bater v. Bater, 75 L. J. P. (1906).

The children of a marriage entered into by a woman subsequent to a divorce obtained in a jurisdiction which is not internationally competent have been held to be illegitimate notwithstanding such marriage was valid under the lex loci celebrationis and the personal law of the second husband. Shaw v. Gould, L. R. 1868, 3 Eng. & Ir. App. 55.

In England a wife is held incapable of establishing a separate domicile from that of her husband, even for the purpose of divorce. Dolphin v. Robins, [1859] 7 H. L. Cas. 390. But it seems that the English courts will take jurisdiction at the instance of a wife deserted by her husband, who, up to the time of such desertion, was domiciled in England. See Armytage v. Armytage, [1898] P. 178; Ogden v. Ogden, [1908] P. 78.

chas. andrews went to Dakota & obtained decree of divorce from his wife in mass she consenting through her atty. He returned to Mass & married X. He lies in mass. & contest between first wife & X for letters of admin. He was always domiciled in mass. Held

ANDREWS v. ANDREWS.

(Supreme Court of the United States, 1903. 188 U. S. 14, 23 Sup. Ct. 237, 47 L. Ed. 366.)

Error to the Supreme Judicial Court of the State of Massachusetts.

Charles S. Andrews, a citizen of Massachusetts, went to South Dakota in order to obtain a divorce from Kate H. Andrews, his wife. The divorce was granted on the ground of desertion, a cause which occurred in Massachusetts while the parties resided there, and which would not authorize a divorce by the laws of Massachusetts.

His wife, through her attorney, consented to the granting of the decree.

A day or two after the rendering of the decree Andrews returned to Massachusetts where he married Annie Andrews and where he continued to reside until his death, in October, 1897. Both Kate H. Andrews and Annie Andrews petitioned to be appointed administratrix of his estate. The Supreme Judicial Court of Massachusetts held that Andrews had never obtained a bona fide domicil in South Dakota and that the decree of divorce would therefore not be recognized under section 35, 2 Rev. Laws Mass. 1902, c. 152, p. 1357, which provides as follows: "A divorce decreed in another state or country according to the laws thereof by a court having jurisdiction of the cause and both the bodies, shall be valid and effectual in this commonwealth; but if an inhabitant of this commonwealth goes into another state or country to obtain a divorce for a cause which occurred here, while the parties resided here, or for a cause which would not authorize a divorce by the laws of this commonwealth, a divorce so obtained shall be of no force or effect in this commonwealth." 176 Mass. 92, 57 N. E. 333. Kate H. Andrews was declared to be the widow of Charles S. Andrews and to be entitled to the administration of his estate.[18]

WHITE, J.[19] * * * As the state of Massachusetts had exclusive jurisdiction over its citizens concerning the marriage tie and its dissolution, and consequently the authority to prohibit them from perpetrating a fraud upon the law of their domicil by temporarily sojourning in another state, and there, without acquiring a bona fide domicil, procuring a decree of divorce, it follows that the South Dakota decree relied upon was rendered by a court without jurisdiction, and hence the due faith and credit clause of the Constitution of the United States did not require the enforcement of such decree in the state of Massachusetts, against the public policy of that state as expressed in its statutes. Indeed, this application of the general principle is not open to dispute, since it has been directly sustained by decisions of this court. Bell v. Bell, 181 U. S. 175, 21 Sup. Ct. 551, 45 L. Ed. 804;

[18] This statement of facts has been substituted for that of the original report.

[19] Portions of the opinion have been omitted.

Streitwolf v. Streitwolf, 181 U. S. 179, 21 Sup. Ct. 553, 45 L. Ed. 807. In each of these cases it was sought in one state to enforce a decree of divorce rendered in another state, and the authority of the due faith and credit clause of the Constitution was invoked for that purpose. It having been established in each case that at the time the divorce proceedings were commenced, the plaintiff in the proceedings had no bona fide domicil within the state where the decree of divorce was rendered, it was held, applying the principle announced in Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897, that the question of jurisdiction was open for consideration, and that, as, in any event, domicil was essential to confer jurisdiction, the due faith and credit clause did not require recognition of such decree outside of the state in which it had been rendered. A like rule, by inverse reasoning, was also applied in the case of Atherton v. Atherton, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794. There, a decree of divorce was rendered in Kentucky in favor of a husband who had commenced proceedings in Kentucky against his wife, then a resident of the state of New York. The courts of the latter state having, in substance, refused to give effect to the Kentucky divorce, the question whether such refusal constituted a violation of the due faith and credit clause of the Constitution was brought to this court for decision. It having been established that Kentucky was the domicil of the husband and had ever been the matrimonial domicil, and, therefore, that the courts of Kentucky had jurisdiction over the subject-matter, it was held that the due faith and credit clause of the Constitution of the United States imposed upon the courts of New York the duty of giving effect to the decree of divorce which had been rendered in Kentucky. * * *

Nor is there force in the suggestion that because, in the case before us, the wife appeared, hence the South Dakota court had jurisdiction to decree the divorce. The contention stated must rest on the premise that the authority of the court depended on the appearance of the parties, and not on its jurisdiction over the subject-matter—that is, bona fide domicil, irrespective of the appearance of the parties. Here again the argument, if sustained, would involve the overruling of Bell v. Bell and Streitwolf v. Streitwolf. As, in each of the cases, jurisdiction was conferred, as far as it could be given, by the appearance of the plaintiff who brought the suit, it follows that the decision that there was no jurisdiction because of the want of bona fide domicil was a ruling that, in its absence, there could be no jurisdiction over the subject-matter, irrespective of the appearance of the party by whom the suit was brought. But it is obvious that the inadequacy of the appearance or consent of one person to confer jurisdiction over a subject-matter not resting on consent includes, necessarily, the want of power of both parties to endow the court with jurisdiction over a subject-matter, which appearance or consent could not give. Indeed, the argument but ignores the nature of the marriage contract and the legislative control over its dissolution which was pointed out

at the outset. The principle dominating the subject is that the marriage relation is so interwoven with public policy that the consent of the parties is impotent to dissolve it contrary to the law of the domicil. The proposition relied upon, if maintained, would involve this contradiction in terms: That marriage may not be dissolved by the consent of the parties, but that they can, by their consent, accomplish the dissolution of the marriage tie by appearing in a court foreign to their domicil and wholly wanting in jurisdiction, and may subsequently compel the courts of the domicil to give effect to such judgment despite the prohibitions of the law of the domicil and the rule of public policy by which it is enforced.

Although it is not essential to the question before us, which calls upon us only to determine whether the decree of divorce rendered in South Dakota was entitled to extraterritorial effect, we observe, in passing, that the statute of South Dakota made domicil, and not mere residence, the basis of divorce proceedings in that state. As, without reference to the statute of South Dakota and in any event, domicil in that state was essential to give jurisdiction to the courts of such state to render a decree of divorce which would have extraterritorial effect, and as the appearance of one or both of the parties to a divorce proceeding could not suffice to confer jurisdiction over the subject-matter, where it was wanting because of the absence of domicil within the state, we conclude that no violation of the due faith and credit clause of the Constitution of the United States arose from the action of the supreme judicial court of Massachusetts in obeying the command of the state statute, and refusing to give effect to the decree of divorce in question. Affirmed.[20]

ATHERTON v. ATHERTON.

(Supreme Court of the United States, 1901. 181 U. S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794.)

This was a suit brought in the Supreme Court of the State of New York by Mary G. Atherton against Peter Lee Atherton for a divorce from bed and board on the ground of cruel and abusive treatment. The defendant appeared in the case. The court found the following facts: The parties were married at Clinton, New York, in 1888, plaintiff being a resident of that place, and defendant a resident of Louis-

[20] Brewer, Shiras, and Peckham, JJ., dissented. Holmes, J., did not sit.

As to character of residence essential to give jurisdiction in divorce proceedings, see 12 L. R. A. (N. S.) 1100–1103.

The party procuring the divorce, having submitted to the jurisdiction of the court, cannot question the validity of the decree in another state. In re Ellis' Estate, 55 Minn. 401, 56 N. W. 1056, 23 L. R. A. 287, 43 Am. St. Rep. 514 (1893); Starbuck v. Starbuck, 173 N. Y. 503, 66 N. E. 193, 93 Am. St. Rep. 631 (1903); Bledsoe v. Seaman (Kan.) 95 Pac. 576 (1908).

ville, Ky. Immediately after the marriage the parties went to and resided at Louisville, Ky., and continued to reside there as husband and wife until 1891. Then, owing to his cruel and abusive treatment, without fault on her part, she left him with the intention of not returning to the state of Kentucky and went to reside with her mother at Clinton, N. Y., and was domiciled in the state of New York.

The defendant, in his answer, besides denying the cruelty charge, set up a decree of divorce from the bonds of matrimony obtained by him against his wife in the state of Kentucky, on the ground that she, without fault upon his part, had abandoned him. She was not served personally in the Kentucky suit, nor did she appear therein, but notice of the proceedings had been sent to her in New York pursuant to the statutes of Kentucky.

The court decided that the decree of the Kentucky court was inoperative and void as against the wife and no bar to the present action and gave judgment in her favor. This judgment was affirmed by the Court of Appeals of the state (155 N. Y. 129, 49 N. E. 933, 40 L. R. A. 291, 63 Am. St. Rep. 650). Defendant sued out a writ of error on the ground that the New York courts had failed to give full faith and credit to the Kentucky decree, as required by the United States Constitution.

GRAY, J.[21] * * * There can be no doubt that this decree was by law and usage entitled to full faith and credit as an absolute decree of divorce in the state of Kentucky. The court of appeals of that state has held that, under its statutes, a wife residing in the state was entitled to obtain a decree of divorce against a husband who had left the state, or who had never been within it; and Chief Justice Robertson said: "It would be a reproach to our legislation if a faithless husband in Kentucky could, by leaving the state, deprive his abandoned wife of a power of obtaining a divorce at home." Rhyms v. Rhyms (1870) 7 Bush, 316; Perzel v. Perzel (1891) 91 Ky. 634, 15 S. W. 658. That court has recognized that the regulation of divorce belongs to the legislature of the domicil of the parties. Maguire v. Maguire (1838) 7 Dana, 181, 185–187. And the same court, where husband and wife had lived together in Kentucky, and she abandoned him, and he became a bona fide citizen of Indiana, held that a divorce from the bonds of matrimony, obtained by him against the wife in that state, by proceedings on constructive service and according to the laws of that state, determined the status of the parties in Kentucky. Hawkins v. Ragsdale (1882) 80 Ky. 353, 44 Am. Rep. 483.

There is a weight of authority in accord with the views maintained by the court of appeals of Kentucky, although there are some decisions of learned courts to the contrary.

The purpose and effect of a decree of divorce from the bond of matrimony by a court of competent jurisdiction are to change the

[21] A part of the opinion has been omitted.

existing status or domestic relation of husband and wife, and to free them both from the bond. The marriage tie, when thus severed as to one party, ceases to bind either. A husband without a wife, or a wife without a husband, is unknown to the law. When the law provides, in the nature of a penalty, that the guilty party shall not marry again, that party, as well as the other, is still absolutely freed from the bond of the former marriage.

The rule as to the notice necessary to give full effect to a decree of divorce is different from that which is required in suits in personam. * * *

In Ditson v. Ditson (1856) 4 R. I. 87 (of which Judge Cooley, in his Treatise on Constitutional Limitations, 403, note, says there is no case in the books more full and satisfactory upon the whole subject of jurisdiction in divorce suits), the supreme court of Rhode Island, in an elaborate opinion by Chief Justice Ames, affirmed its jurisdiction, upon constructive notice by publication, to grant a divorce to a wife domiciled in Rhode Island against a husband who had never been in Rhode Island, and whose place of residence was unknown; and said: "It is obvious that marriage, as a domestic relation, emerged from the contract which created it, is known and recognized as such throughout the civilized world; that it gives rights and imposes duties and restrictions upon the parties to it, affecting their social and moral condition, of the measure of which every civilized state, and certainly every state of this Union, is the sole judge, so far as its own citizens or subjects are concerned, and should be so deemed by other civilized and especially sister states; that a state cannot be deprived, directly or indirectly, of its sovereign power to regulate the status of its own domiciled subjects and citizens, by the fact that the subjects and citizens of other states, as related to them, are interested in that status; and in such a matter has a right, under the general law, judicially to deal with and modify or dissolve this relation, binding both parties to it by the decree, by virtue of its inherent power over its own citizens and subjects, and to enable it to answer their obligatory demands for justice; and finally, that in the exercise of this judicial power, and in order to the validity of a decree of divorce, whether a mensa et thoro or a vinculo matrimonii, the general law does not deprive a state of its proper jurisdiction over the condition of its own citizens, because nonresidents, foreigners, or domiciled inhabitants of other states have not or will not become, and cannot be made to become, personally subject to the jurisdiction of its courts; but, upon the most familiar principles, and as illustrated by the most familiar analogies of general law, its courts may and can act conclusively in such a matter upon the rights and interests of such persons giving to them such notice, actual or constructive, as the nature of the case admits of, and the practice of courts in similar cases sanctions." 4 R. I. 105, 106. * * *

In a very recent case, the Court of Errors and Appeals of New Jersey maintained the validity of a divorce obtained in the state of Utah by a husband having his bona fide domicil there, against a wife whose domicil was in New Jersey, after publication of the process and complaint in accordance with the statutes of Utah, and personal service upon the wife in New Jersey in time to enable her to make defense, if she wished to do so. Mr. Justice Gummere, speaking for the Court of Errors and Appeals, said that, at least "interstate comity requires that a decree of divorce, pronounced by a court of the state in which the complainant is domiciled, and which has jurisdiction of the subject-matter of the suit, shall, in the absence of fraud, be given full force and effect within the jurisdiction of a sister state, notwithstanding that the defendant does not reside within the jurisdiction of the court which pronounced the decree, and has not been served with process therein; provided that a substituted service has been made in accordance with the provisions of the statute of that state, and that actual notice of the pendency of the suit has been given to the defendant, and a reasonable opportunity afforded to put in a defense thereto; and provided, further, that the ground upon which the decree rests is one which the public policy of the state in which it is sought to be enforced recognizes as a sufficient cause for divorce." Felt v. Felt (1899) 59 N. J. Eq. 606, 45 Atl. 105, 49 Atl. 1071, 47 L. R. A. 546, 83 Am. St. Rep. 612.

In New York, North Carolina, and South Carolina, the opposite view has prevailed, either upon the ground that the rule as to notice is the same in suits for divorce as in ordinary suits in personam, or upon the ground that, in the absence of actual notice or appearance, the decree, while it may release the libellant, cannot release the libellee from the bond of matrimony. People v. Baker (1879) 76 N. Y. 78, 32 Am. Rep. 274; O'Dea v. O'Dea (1885) 101 N. Y. 23, 4 N. E. 110; Re Kimball (1898) 155 N. Y. 62, 49 N. E. 331; Irby v. Wilson (1837) 21 N. C. 568; McCreery v. Davis (1894) 44 S. C. 195, 22 S. E. 178, 28 L. R. A. 655, 51 Am. St. Rep. 794.

In People v. Baker, 76 N. Y. 78, 32 Am. Rep. 274, upon which the subsequent decisions in New York are based, the defendant was married to a woman in the state of Ohio; they afterwards lived together in the state of New York; the wife, upon notice by publication, and without personal appearance of the husband, he being in New York, obtained a decree of divorce against him in Ohio; and he afterwards married another woman in New York, and was convicted of bigamy there. The conviction was affirmed by the court of appeals, without a suggestion that the first wife was not domiciled in Ohio at the time of the divorce, but stating the question in the case to be: "Can a court, in another state, adjudge to be dissolved and at an end the matrimonial relation of a citizen of this state, domiciled and actually abiding here throughout the pendency of the judicial proceedings there, without a voluntary appearance by him therein, and with no actual

notice to him thereof, and without personal service of process on him in that state?" The court admitted that "if one party to a proceeding is domiciled in a state, the status of that party, as affected by the matrimonial relation, may be adjudged upon and confirmed or changed in accordance with the laws of that state;" but held that, without personal appearance or actual notice, the decree could not affect the matrimonial relation of the defendant in another state. The court recognized that the law was settled otherwise in some states, and said: "It remains for the Supreme Court of the United States, as the final arbiter, to determine how far a judgment rendered in such a case, upon such substituted service of process, shall be operative without the territorial jurisdiction of the tribunal giving it."

The authorities above cited show the wide diversity of opinion existing upon this important subject, and admonish us to confine our decision to the exact case before us.

This case does not involve the validity of a divorce granted, on constructive service, by the court of a state in which only one of the parties ever had a domicil; nor the question to what extent the good faith of the domicil may be afterwards inquired into. In this case, the divorce in Kentucky was by the court of the state which had always been the undoubted domicil of the husband, and which was the only matrimonial domicil of the husband and wife. The single question to be decided is the validity of that divorce, granted after such notice had been given as was required by the statutes of Kentucky.

The husband always had his domicil in Kentucky, and the matrimonial domicil of the parties was in Kentucky. On December 28, 1892, the husband filed his petition for a divorce in the court of appropriate jurisdiction in Kentucky, alleging an abandonment of him by the wife in Kentucky, and a continuance of that abandonment for a year, which was a cause of divorce by the laws of Kentucky. His petition truly stated, upon oath, as required by the statutes of Kentucky, that the wife might be found at Clinton in the state of New York, and that at Clinton was the postoffice nearest the place where she might be found. As required by the statutes of Kentucky, the clerk thereupon entered a warning order to the wife to appear in sixty days, and appointed an attorney at law to represent her. The attorney, on January 5, 1893, wrote to the wife at Clinton, fully advising her of the object of the petition for divorce, and inclosing a copy thereof in a letter addressed to her by mail at Clinton, and having printed on the envelope a direction to return it to him, if not delivered in ten days. There is a presumption of fact, though not of law, that a letter put into the postoffice, and properly addressed, is received by the person to whom it is addressed. Rosenthal v. Walker (1884) 111 U. S. 185, 4 Sup. Ct. 382, 28 L. Ed. 395. On February 6, 1893, the attorney, having received no answer, made his report to the court. And on March 14, 1893, the court, after taking evidence, granted the husband an absolute decree of divorce for his wife's abandonment of him.

The court of New York has indeed found that the wife "was not personally served with process within the state of Kentucky, or at all." It may be doubted whether this negatives her having received or had knowledge of the letter sent to her by the attorney in Kentucky, January 5, 1893, six days before she began her suit in New York. But assuming that it does, the question in this case is not whether she had actual notice of the proceedings for divorce, but whether such reasonable steps had been taken to give her notice as to bind her by the decree in the state of the domicil.

The court in New York found that the wife left the husband and went to Clinton with the purpose and intention of not returning to the state of Kentucky, but of permanently residing in the state of New York; and that this purpose and intention were understood by the husband at the time, and were contemplated and evidenced by the agreement executed by the parties in Kentucky, October 10, 1891. But that agreement was among the proofs submitted to the court in Kentucky, and may well have been considered by that court, as the preamble to the agreement states, as simply intended to provide for the interest of their child, recognizing that the parties had ceased to live together as husband and wife, but "without in any way acknowledging upon whom is the fault, or condoning the conduct of the one or the other which has led to the existing state of affairs, or preventing any consequences which may follow, or right which may arise to either party if such status shall continue." The agreement contains no mention of the domicil of either husband or wife, but declares that the domicil of the child is to be the state of Kentucky, and is taken up with providing that its custody shall be half of each year with the mother and the other half with the paternal grandmother, and with providing for the support and custody of the child in various future contingencies, including the divorce and second marriage of the husband or of the wife.

We are of opinion that the undisputed facts show that such efforts were required by the statutes of Kentucky, and were actually made, to give the wife actual notice of the suit in Kentucky, as to make the decree of the court there, granting a divorce upon the ground that she had abandoned her husband, as binding on her as if she had been served with notice in Kentucky, or had voluntarily appeared in the suit. Binding her to that full extent, it established, beyond contradiction, that she had abandoned her husband, and precludes her from asserting that she left him on account of his cruel treatment.

To hold otherwise would make it difficult, if not impossible, for the husband to obtain a divorce for the cause alleged, if it actually existed. The wife not being within the state of Kentucky, if constructive notice, with all the precautions prescribed by the statutes of that state, were insufficient to bind her by a decree dissolving the bond of matrimony, the husband could only get a divorce by suing in the state in which she was found; and by the very fact of suing her there he

would admit that she had acquired a separate domicil (which he denied), and would disprove his own ground of action, that she had abandoned him in Kentucky.

The result is that the courts of New York have not given to the Kentucky decree of divorce the faith and credit which it had by law in Kentucky, and that therefore their—

Judgments must be reversed, and the case remanded to the Supreme Court of New York for further proceedings not inconsistent with this opinion.[22]

HADDOCK v. HADDOCK.

(Supreme Court of the United States, 1906. 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867.)

WHITE, J.[23] The plaintiff in error will be called the husband and the defendant in error the wife.

The wife, a resident of the state of New York, sued the husband in that state in 1899, and there obtained personal service upon him. The complaint charged that the parties had been married in New York in 1868, where they both resided and where the wife continued to reside, and it was averred that the husband, immediately following the marriage, abandoned the wife, and thereafter failed to support her, and that he was the owner of property. A decree of separation from bed and board and for alimony was prayed. The answer admitted the marriage, but averred that its celebration was procured by the fraud of the wife, and that immediately after the marriage the parties had separated by mutual consent. It was also alleged that during the long period between the celebration and the bringing of this action the wife had in no manner asserted her rights, and was barred by her laches from doing so. Besides, the answer alleged that the husband had, in 1881, obtained in a court of the state of Connecticut a divorce which was conclusive. At the trial before a referee the judgment roll in the suit for divorce in Connecticut was offered by the husband and was objected to, first, because the Connecticut court had not obtained jurisdiction over the person of the defendant wife, as the notice of the pendency of the petition was by publication and she had not appeared in the action; and, second, because the ground upon which the divorce was granted, viz., desertion by the wife, was false. The referee sustained the objections and an exception was noted. The judgment roll in question was then marked for identification and forms a part of the record before us.

Having thus excluded the proceedings in the Connecticut court, the referee found that the parties were married in New York in 1868, that

[22] The dissenting opinion of Peckham, J., concurred in by Fuller, C. J., has been omitted.

[23] Part of the opinion is omitted.

the wife was a resident of the state of New York, that after the marriage the parties never lived together, and shortly thereafter that the husband, without justifiable cause, abandoned the wife, and has since neglected to provide for her. The legal conclusion was that the wife was entitled to a separation from bed and board and alimony in the sum of $780 a year from the date of the judgment. The action of the referee was sustained by the supreme court of the state of New York, and a judgment for separation and alimony was entered in favor of the wife. This judgment was affirmed by the court of appeals. As, by the law of the state of New York, after the affirmance by the court of appeals the record was remitted to the supreme court, this writ of error to that court was prosecuted.

The federal question is, Did the court below violate the Constitution of the United States by refusing to give to the decree of divorce rendered in the state of Connecticut the faith and credit to which it was entitled?

As the averments concerning the alleged fraud in contracting the marriage and the subsequent laches of the wife are solely matters of state cognizance, we may not allow them to even indirectly influence our judgment upon the federal question to which we are confined, and we, therefore, put these subjects entirely out of view. Moreover, as, for the purpose of the federal issue, we are concerned not with the mere form of proceeding by which the federal right, if any, was denied, but alone have power to decide whether such right was denied, we do not inquire whether the New York court should preferably have admitted the record of the Connecticut divorce suit, and, after so admitting it, determined what effect it would give to it, instead of excluding the record, and thus refusing to give effect to the judgment. In order to decide whether the refusal of the court to admit in evidence the Connecticut decree denied to that decree the efficacy to which it was entitled under the full faith and credit clause, we must first examine the judgment roll of the Connecticut cause in order to fix the precise circumstances under which the decree in that cause was rendered.

Without going into detail, it suffices to say that on the face of the Connecticut record it appeared that the husband, alleging that he had acquired a domicil in Connecticut, sued the wife in that state as a person whose residence was unknown, but whose last known place of residence was in the state of New York, at a place stated, and charged desertion by the wife and fraud on her part in procuring the marriage; and, further, it is shown that no service was made upon the wife except by publication and by mailing a copy of the petition to her at her last known place of residence in the state of New York.

With the object of confining our attention to the real question arising from this condition of the Connecticut record, we state at the outset certain legal propositions irrevocably concluded by previous deci-

sions of this court, and which are required to be borne in mind in analyzing the ultimate issue to be decided.

First. The requirement of the Constitution is not that some, but that full, faith and credit shall be given by states to the judicial decrees of other states. That is to say, where a decree rendered in one state is embraced by the full faith and credit clause, that constitutional provision commands that the other states shall give to the decree the force and effect to which it was entitled in the state where rendered. Harding v. Harding, 198 U. S. 317, 25 Sup. Ct. 679, 49 L. Ed. 1066.

Second. Where a personal judgment has been rendered in the courts of a state against a nonresident merely upon constructive service, and, therefore, without acquiring jurisdiction over the person of the defendant, such judgment may not be enforced in another state in virtue of the full faith and credit clause. Indeed, a personal judgment so rendered is, by operation of the due process clause of the 14th Amendment, void as against the nonresident, even in the state where rendered; and, therefore, such nonresident, in virtue of rights granted by the Constitution of the United States, may successfully resist, even in the state where rendered, the enforcement of such a judgment. Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565. * * *

Third. The principles, however, stated in the previous proposition, are controlling only as to judgments in personam, and do not relate to proceedings in rem. That is to say, in consequence of the authority which government possesses over things within its borders, there is jurisdiction in a court of a state by a proceeding in rem, after the giving of reasonable opportunity to the owner to defend, to affect things within the jurisdiction of the court, even although jurisdiction is not directly acquired over the person of the owner of the thing. Pennoyer v. Neff, supra.

Fourth. The general rule stated in the second proposition is, moreover, limited by the inherent power which all governments must possess over the marriage relation, its formation and dissolution, as regards their own citizens. From this exception it results that where a court of one state, conformably to the laws of such state, or the state through its legislative department, has acted concerning the dissolution of the marriage tie, as to a citizen of that state, such action is binding in that state as to such citizen, and the validity of the judgment may not therein be questioned on the ground that the action of the state in dealing with its own citizen concerning the marriage relation was repugnant to the due process clause of the Constitution. Maynard v. Hill, 125 U. S. 190, 8 Sup. Ct. 723, 31 L. Ed. 654. In that case the facts were these: Maynard was married in Vermont, and the husband and wife removed to Ohio, from whence Maynard left his wife and family and went to California. Subsequently he acquired a domicil in the territory of Washington. Being there so domiciled, an act of the legislature of the territory was passed granting a divorce to the husband. Maynard continued to reside in Washington, and

there remarried and died. The children of the former wife, claiming in right of their mother, sued in a court of the territory of Washington to recover real estate situated in the territory, and one of the issues for decision was the validity of the legislative divorce granted to the father. The statute was assailed as invalid, on the ground that Mrs. Maynard had no notice, and that she was not a resident of the territory when the act was passed. From a decree of the supreme court of the territory adverse to their claim the children brought the case to this court. The power of the territorial legislature, in the absence of restrictions in the organic act, to grant a divorce to a citizen of the territory, was, however, upheld, in view of the nature and extent of the authority which government possessed over the marriage relation. It was therefore decided that the courts of the territory committed no error in giving effect within the territory to the divorce in question. And as a corollary of the recognized power of a government thus to deal with its own citizen by a decree which would be operative within its own borders, irrespective of any extraterritorial efficacy, it follows that the right of another sovereignty exists, under principles of comity, to give to a decree so rendered such efficacy as to that government may seem to be justified by its conceptions of duty and public policy.

Fifth. It is no longer open to question that where husband and wife are domiciled in a state there exists jurisdiction in such state, for good cause, to enter a decree of divorce which will be entitled to enforcement in another state by virtue of the full faith and credit clause. It has, moreover, been decided that where a bona fide domicil has been acquired in a state by either of the parties to a marriage, and a suit is brought by the domiciled party in such state for divorce, the courts of that state, if they acquire personal jurisdiction also of the other party, have authority to enter a decree of divorce, entitled to be enforced in every state by the full faith and credit clause. Cheever v. Wilson, 9 Wall. 108, 19 L. Ed. 604.

Sixth. Where the domicil of matrimony was in a particular state, and the husband abandons his wife and goes into another state in order to avoid his marital obligations, such other state to which the husband has wrongfully fled does not, in the nature of things, become a new domicil of matrimony, and, therefore, is not to be treated as the actual or constructive domicil of the wife; hence, the place where the wife was domiciled when so abandoned constitutes her legal domicil until a new actual domicil be by her elsewhere acquired. This was clearly expressed in Barber v. Barber, 21 How. 582, 16 L. Ed. 226, where it was said (page 595, of 21 How., 16 L. Ed. p. 230):

"The general rule is, that a voluntary separation will not give to the wife a different domiciliation in law from that of her husband. But if the husband, as is the fact in this case, abandons their domicil and his wife, to get rid of all those conjugal obligations which the marriage relation imposes upon him, neither giving to her the necessaries nor the

comforts suitable to their condition and his fortune, and relinquishes altogether his marital control and protection, he yields up that power and authority over her which alone makes his domicil hers."

And the same doctrine was expressly upheld in Cheever v. Wilson, supra, where the court said (9 Wall. 123, 19 L. Ed. 608):

"It is insisted that Cheever never resided in Indiana; that the domicil of the husband is the wife's, and that she cannot have a different one from his. The converse of the latter proposition is so well settled that it would be idle to discuss it. The rule is that she may acquire a separate domicil whenever it is necessary or proper that she should do so. The right springs from the necessity of its exercise, and endures as long as the necessity continues."

Seventh. So also it is settled that where the domicil of a husband is in a particular state, and that state is also the domicil of matrimony, the courts of such state having jurisdiction over the husband may, in virtue of the duty of the wife to be at the matrimonial domicil, disregard an unjustifiable absence therefrom, and treat the wife as having her domicil in the state of the matrimonial domicil for the purpose of the dissolution of the marriage, and as a result have power to render a judgment dissolving the marriage which will be binding upon both parties, and will be entitled to recognition in all other states by virtue of the full faith and credit clause. Atherton v. Atherton, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794.

Coming to apply these settled propositions to the case before us, three things are beyond dispute: a. In view of the authority which government possesses over the marriage relation, no question can arise on this record concerning the right of the state of Connecticut within its borders to give effect to the decree of divorce rendered in favor of the husband by the courts of Connecticut, he being at the time when the decree was rendered domiciled in that state. b. As New York was the domicil of the wife and the domicil of matrimony, from which the husband fled in disregard of his duty, it clearly results from the sixth proposition that the domicil of the wife continued in New York. c. As then there can be no question that the wife was not constructively present in Connecticut by virtue of a matrimonial domicil in that state, and was not there individually domiciled, and did not appear in the divorce cause, and was only constructively served with notice of the pendency of that action, it is apparent that the Connecticut court did not acquire jurisdiction over the wife within the fifth and seventh propositions; that is, did not acquire such jurisdiction by virtue of the domicil of the wife within the state or as the result of personal service upon her within its borders.

These subjects being thus eliminated, the case reduces itself to this: Whether the Connecticut court, in virtue alone of the domicil of the husband in that state, had jurisdiction to render a decree against the wife under the circumstances stated, which was entitled to be enforced in other states in and by virtue of the full faith and credit clause of

the Constitution. In other words, the final question is whether, to enforce in another jurisdiction the Connecticut decree, would not be to enforce in one state a personal judgment rendered in another state against a defendant over whom the court of the state rendering the judgment had not acquired jurisdiction? Otherwise stated, the question is this: Is a proceeding for divorce of such an exceptional character as not to come within the rule limiting the authority of a state to persons within its jurisdiction, but, on the contrary, because of the power which government may exercise over the marriage relation, constitutes an exception to that rule, and is therefore embraced either within the letter or spirit of the doctrine stated in the third and fourth propositions?

Before reviewing the authorities relied on to establish that a divorce proceeding is of the exceptional nature indicated, we propose first to consider the reasons advanced to sustain the contention. In doing so, however, it must always be borne in mind that it is elementary that where the full faith and credit clause of the Constitution is invoked to compel the enforcement in one state of a decree rendered in another, the question of the jurisdiction of the court by which the decree was rendered is open to inquiry. And if there was no jurisdiction, either of the subject-matter or of the person of the defendant, the courts of another state are not required, by virtue of the full faith and credit clause of the Constitution, to enforce such decree. National Exch. Bank v. Wiley, 195 U. S. 257, 269, 25 Sup. Ct. 70, 49 L. Ed. 184, 190, and cases cited.

I. The wide scope of the authority which government possesses over the contract of marriage and its dissolution is the basis upon which it is argued that the domicil within one state of one party to the marriage gives to such a state jurisdiction to decree a dissolution of the marriage tie which will be obligatory in all the other states by force of the full faith and credit clause of the Constitution. But the deduction is destructive of the premise upon which it rests. This becomes clear when it is perceived that if one government, because of its authority over its own citizens, has the right to dissolve the marriage tie as to the citizen of another jurisdiction, it must follow that no government possesses as to its own citizens, power over the marriage relation and its dissolution. For if it be that one government, in virtue of its authority over marriage, may dissolve the tie as to citizens of another government, other governments would have a similar power, and hence the right of every government as to its own citizens might be rendered nugatory by the exercise of the power which every other government possessed. To concretely illustrate: If the fact be that where persons are married in the state of New York either of the parties to the marriage may, in violation of the marital obligations, desert the other and go into the state of Connecticut, there acquiring a domicil, and procure a dissolution of the marriage which would be binding in the state of New York as to the party to the

marriage there domiciled, it would follow that the power of the state of New York as to the dissolution of the marriage as to its domiciled citizen would be of no practical avail. And conversely, the like result would follow if the marriage had been celebrated in Connecticut and desertion had been from that state to New York, and consequently the decree of divorce had been rendered in New York. Even a superficial analysis will make this clear. Under the rule contended for it would follow that the states whose laws were the most lax as to length of residence required for domicil, as to causes for divorce and to speed of procedure concerning divorce, would in effect dominate all the other states. In other words, any person who was married in one state and who wished to violate the marital obligations, would be able, by following the lines of least resistance, to go into the state whose laws were the most lax, and there avail of them for the purpose of the severance of the marriage tie and the destruction of the rights of the other party to the marriage contract, to the overthrow of the laws and the public policy of the other states. Thus the argument comes necessarily to this,—that to preserve the lawful authority of all the states over marriage it is essential to decide that all the states have such authority only at the sufferance of the other states. And the considerations just stated serve to dispose of the argument that the contention relied on finds support in the ruling made in Maynard v. Hill, referred to in the fourth proposition, which was at the outset stated. For in that case the sole question was the effect within the territory of Washington of a legislative divorce granted in the territory to a citizen thereof. The upholding of the divorce within the territory was, therefore, but a recognition of the power of the territorial government, in virtue of its authority over marriage, to deal with a person domiciled within its jurisdiction. The case, therefore, did not concern the extraterritorial efficacy of the legislative divorce. In other words, whilst the ruling recognized the ample powers which government possesses over marriage as to one within its jurisdiction, it did not purport to hold that such ample powers might be exercised and enforced by virtue of the Constitution of the United States in another jurisdiction as to citizens of other states to whom the jurisdiction of the territory did not extend.

The anomalous result which it is therefore apparent would arise from maintaining the proposition contended for is made more manifest by considering the instrument from which such result would be produced,—that is, the full faith and credit clause of the Constitution. No one denies that the states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce. No one, moreover, can deny that, prior to the adoption of the Constitution, the extent to which the states would recognize a divorce obtained in a foreign jurisdiction depended upon their conceptions of duty and comity. Besides, it must be conceded that the Constitution delegated no authority to the government of the United States on the

subject of marriage and divorce. Yet, if the proposition be maintained, it would follow that the destruction of the power of the states over the dissolution of marriage, as to their own citizens, would be brought about by the operation of the full faith and credit clause of the Constitution. That is to say, it would come to pass that, although the Constitution of the United States does not interfere with the authority of the states over marriage, nevertheless the full faith and credit clause of that instrument destroyed the authority of the states over the marriage relation. And as the government of the United States has no delegated authority on the subject, that government would be powerless to prevent the evil thus brought about by the full faith and credit clause. Thus neither the states nor the national government would be able to exert that authority over the marriage tie possessed by every other civilized government. Yet more remarkable would be such result when it is borne in mind that, when the Constitution was adopted, nowhere, either in the mother country or on the continent of Europe, either in adjudged cases or in the treatises of authoritative writers, had the theory ever been upheld or been taught or even suggested that one government, solely because of the domicil within its borders of one of the parties to a marriage, had authority, without the actual or constructive presence of the other, to exert its authority by a dissolution of the marriage tie, which exertion of power it would be the duty of other states to respect as to those subject to their jurisdiction.

II. It is urged that the suit for divorce was a proceeding in rem, and, therefore, the Connecticut court had complete jurisdiction to enter a decree as to the res, entitled to be enforced in the state of New York. But here again the argument is contradictory. It rests upon the theory that jurisdiction in Connecticut depended upon the domicil of the person there suing, and yet attributes to the decree resting upon the domicil of one of the parties alone a force and effect based upon the theory that a thing within the jurisdiction of Connecticut was the subject-matter of the controversy. But putting this contradiction aside, what, may we ask, was the res in Connecticut? Certainly it cannot in reason be said that it was the cause of action or the mere presence of the person of the plaintiff within the jurisdiction. The only possible theory, then, upon which the proposition proceeds, must be that the res in Connecticut, from which the jurisdiction is assumed to have arisen, was the marriage relation. But as the marriage was celebrated in New York between citizens of that state, it must be admitted under the hypothesis stated, that before the husband deserted the wife in New York the res was in New York, and not in Connecticut. As the husband, after wrongfully abandoning the wife in New York, never established a matrimonial domicil in Connecticut, it cannot be said that he took with him the marital relation from which he fled to Connecticut. Conceding, however, that he took with him to Connecticut so much of the marital relation as concerned his individual status,

it cannot in reason be said that he did not leave in New York so much of the relation as pertained to the status of the wife. From any point of view, then, under the proposition referred to, if the marriage relation be treated as the res, it follows that it was divisible, and therefore there was a res in the state of New York and one in the state of Connecticut. Thus considered, it is clear that the power of one state did not extend to affecting the thing situated in another state. As illustrating this conception, we notice the case of Mississippi & M. R. Co. v. Ward, 2 Black, 485, 17 L. Ed. 311. The facts in that case were these: A bill was filed in a district court of the United States for the district of Iowa to abate a nuisance alleged to have been occasioned by a bridge across the Mississippi river, dividing the states of Illinois and Iowa. Under the assumption that the nuisance was occasioned by the operation of the bridge on the Illinois side, the court, after pointing out that the United States circuit court for the district of Iowa exercised the same jurisdiction that a state court of Iowa could exercise, and no more, said (2 Black, 494, 17 L. Ed. 315):

"The district court had no power over the local object inflicting the injury; nor any jurisdiction to inquire of the facts, whether damage had been sustained, or how much. These facts are beyond the court's jurisdiction and powers of inquiry, and outside of the case."

Nor has the conclusive force of the view which we have stated been met by the suggestion that the res was indivisible, and therefore was wholly in Connecticut and wholly in New York, for this amounts but to saying that the same thing can be at one and the same time in different places. Further, the reasoning above expressed disposes of the contention that, as the suit in Connecticut involved the status of the husband, therefore the courts of that state had the power to determine the status of the nonresident wife by a decree which had obligatory force outside of the state of Connecticut. Here, again, the argument comes to this—that, because the state of Connecticut had jurisdiction to fix the status of one domiciled within its borders, that state also had the authority to oust the state of New York of the power to fix the status of a person who was undeniably subject to the jurisdiction of that state.

III. It is urged that whilst marriage is, in one aspect, a contract, it is nevertheless a contract in which society is deeply interested, and, therefore, government must have the power to determine whether a marriage exists or to dissolve it, and hence the Connecticut court had jurisdiction of the relation and the right to dissolve it, not only as to its own citizen, but as to a citizen of New York who was not subject to the jurisdiction of the state of Connecticut. The proposition involves in another form of statement the non sequitur which we have previously pointed out; that is, that because government possesses power over marriage, therefore the existence of that power must be rendered unavailing,

Nor is the contention aided by the proposition that because it is impossible to conceive of the dissolution of the marriage as to one of the parties in one jurisdiction without, at the same time, saying that the marriage is dissolved as to both in every other jurisdiction, therefore the Connecticut decree should have obligatory effect in New York as to the citizen of that state. For, again, by a change of form of statement, the same contention which we have disposed of is reiterated. Besides, the proposition presupposes that because, in the exercise of its power over its own citizens, a state may determine to dissolve the marriage tie by a decree which is efficacious within its borders, therefore such decree is in all cases binding in every other jurisdiction. As we have pointed out at the outset, it does not follow that a state may not exert its power as to one within its jurisdiction simply because such exercise of authority may not be extended beyond its borders into the jurisdiction and authority of another state. The distinction was clearly pointed out in Blackinton v. Blackinton, 141 Mass. 432, 55 Am. Rep. 484, 5 N. E. 830. In that case the parties were married and lived in Massachusetts. The husband abandoned the wife without cause and became domiciled in New York. The wife remained at the matrimonial domicil in Massachusetts and instituted a proceeding to prohibit her husband from imposing any restraint upon her personal liberty and for separate maintenance. Service was made upon the husband in New York. The court, recognizing fully that under the circumstances disclosed the domicil of the husband was not the domicil of the wife, concluded that, under the statutes of Massachusetts, it had authority to grant the relief prayed, and was then brought to determine whether the decree ought to be made, in view of the fact that such decree might not have extraterritorial force. But this circumstance was held not to be controlling, and the decree was awarded. The same doctrine was clearly expounded by the Privy Council, in an opinion delivered by Lord Watson, in the divorce case of Le Mesurier v. Le Mesurier [1895] A. C. 517, where it was said (page 527):

"When the jurisdiction of the court is exercised according to the rules of international law, as in the case where the parties have their domicil within its forum, its decree dissolving their marriage ought to be respected by the tribunals of every civilized country. * * * On the other hand, a decree of divorce a vinculo, pronounced by a court whose jurisdiction is solely derived from some rule of municipal law peculiar to its forum, cannot, when it trenches upon the interests of any other country to whose tribunals the spouses were amenable, claim extraterritorial authority."

IV. The contention that if the power of one state to decree a dissolution of a marriage which would be compulsory upon the other states be limited to cases where both parties are subject to the jurisdiction, the right to obtain a divorce could be so hampered and restricted as to be in effect impossible of exercise, is but to insist that in order to favor the dissolution of marriage and to cause its permanency to

depend upon the mere caprice or wrong of the parties, there should not be applied to the right to obtain a divorce those fundamental principles which safeguard the exercise of the simplest rights. In other words, the argument but reproduces the fallacy already exposed, which is, that one state must be endowed with the attribute of destroying the authority of all the others concerning the dissolution of marriage in order to render such dissolution easy of procurement. But even if the true and controlling principles be for a moment put aside and mere considerations of inconvenience be looked at, it would follow that the preponderance of inconvenience would be against the contention that a state should have the power to exert its authority concerning the dissolution of marriage as to those not amenable to its jurisdiction. By the application of that rule each state is given the power of overshadowing the authority of all the other states, thus causing the marriage tie to be less protected than any other civil obligation, and this to be accomplished by destroying individual rights without a hearing and by tribunals having no jurisdiction. Further, the admission that jurisdiction in the courts of one state over one party alone was the test of the right to dissolve the marriage tie as to the other party, although domiciled in another state, would at once render such test impossible of general application. In other words, the test, if admitted, would destroy itself. This follows, since if that test were the rule, each party to the marriage in one state would have a right to acquire a domicil in a different state and there institute proceedings for divorce. It would hence necessarily arise that domicil would be no longer the determinative criterion, but the mere race of diligence between the parties in seeking different forums in other states or the celerity by which in such states judgments of divorce might be procured would have to be considered in order to decide which forum was controlling.

On the other hand, the denial of the power to enforce in another state a decree of divorce rendered against a person who was not subject to the jurisdiction of the state in which the decree was rendered obviates all the contradictions and inconveniences which are above indicated. It leaves uncurtailed the legitimate power of all the states over a subject peculiarly within their authority, and thus not only enables them to maintain their public policy, but also to protect the individual rights of their citizens. It does not deprive a state of the power to render a decree of divorce susceptible of being enforced within its borders as to the person within the jurisdiction, and does not debar other states from giving such effect to a judgment of that character as they may elect to do under mere principles of state comity. It causes the full faith and credit clause of the Constitution to operate upon decrees of divorce in the respective states just as that clause operates upon other rights—that is, it compels all the states to recognize and enforce a judgment of divorce rendered in other states where both parties were subject to the jurisdiction of the state

in which the decree was rendered, and it enables the states rendering such decrees to take into view, for the purpose of the exercise of their authority, the existence of a matrimonial domicil from which the presence of a party not physically present within the borders of a state may be constructively found to exist.

Having thus disposed of the reasoning advanced to sustain the assertion that the courts of the state of New York were bound by the full faith and credit clause to give full effect to the Connecticut decree, we are brought to consider the authorities relied upon to support that proposition.

Whilst the continental and English authorities are not alluded to in the argument, it may be well, in the most summary way, to refer to them as a means of illustrating the question for consideration. The extent of the power which independent sovereignties exercised over the dissolution of the marriage tie, as to their own citizens, gave rise, in the nature of things, to controversies concerning the extraterritorial effect to be given to a dissolution of such tie when made between citizens of one country by judicial tribunals of another country in which such citizens had become domiciled. We do not deem it essential, however, to consider the conflicting theories and divergent rules of public policy which were thus engendered. We are relieved of the necessity of entering upon such an inquiry, since it cannot be doubted that neither the practice nor the theories controlling in the countries on the continent lend the slightest sanction to the contention that a government, simply because one of the parties to a marriage was domiciled within its borders, where no matrimonial domicil ever existed, had power to render a decree dissolving a marriage, which, on principles of international law, was entitled to obligatory extraterritorial effect as to the other party to the marriage, a citizen of another country. 1 Wharton, Confl. L. (3d Ed.) § 209, p. 441, and notes.

It cannot be doubted, also, that the courts of England decline to treat a foreign decree of divorce as having obligatory extraterritorial force when both parties to the marriage were not subject to the jurisdiction of the court which rendered the decree. Shaw v. Gould, L. R. 3 H. L. 55; Harvey v. Farnie, L. R. 8 App. Cas. 43. And, although it has been suggested in opinions of English judges treating of divorce questions, that exceptional cases might arise which perhaps would justify a relaxation of the rigor of a presumption that the domicil of the husband was the domicil of the wife (per Lords Eldon and Redesdale, in Tovey v. Lindsay, 1 Dow, P. C. 133, 140; per Lord Westbury, in Pitt v. Pitt, 4 Macq. H. L. Cas. 627, 640; per Brett, L. J., in Niboyet v. Niboyet, L. R. 4 Prob. Div. 1, 14; Briggs v Briggs, L. R. 5 Prob. Div. 163, 165; and per James and Cotton, L. JJ., in Harvey v. Farnie, L. R. 6 Prob. Div. 47, 49), the courts of England, in cases where the jurisdiction was dependent upon domicil, have enforced the presumption, and treated the wife as being within the jurisdiction where

the husband was legally domiciled. But this conception was not a departure from the principle uniformly maintained, that, internationally considered, jurisdiction over both parties to a marriage was essential to the exercise of power to decree a divorce, but was simply a means of determining by a legal presumption whether both parties were within the jurisdiction. Of course, the rigor of the English rule as to the domicil of the husband being the domicil of the wife is not controlling in this court, in view of the decisions to which we have previously referred, recognizing the right of the wife, for the fault of the husband, to acquire a separate domicil. Barber v. Barber, 21 How. 582, 16 L. Ed. 226; Cheever v. Wilson, 9 Wall. 108, 19 L. Ed. 604; Atherton v. Atherton, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794.

And even in Scotland, where residence, as distinguished from domicil, was deemed to authorize the exercise of jurisdiction to grant divorces, it was invariably recognized that the presence within the jurisdiction of both parties to the marriage was essential to authorize a decree in favor of the complainant. 1 Wharton, Confl. L. § 215, p. 447; per Lord Westbury, in Shaw v. Gould, L. R. 3 H. L. 88.

As respects the decisions of this court: We at once treat as inapposite, and therefore unnecessary to be here specially reviewed, those holding (a) that where the domicil of a plaintiff in a divorce cause is in the state where the suit was brought, and the defendant appears and defends, as both parties are before the court, there is power to render a decree of divorce which will be entitled in other states to recognition under the full faith and credit clause (Cheever v. Wilson, supra); (b) that, as distinguished from legal domicil, mere residence within a particular state of the plaintiff in a divorce cause brought in a court of such state is not sufficient to confer jurisdiction upon such court to dissolve the marriage relation existing between the plaintiff and a nonresident defendant. Andrews v. Andrews, 188 U. S. 14, 23 Sup. Ct. 237, 47 L. Ed. 366; Streitwolf v. Streitwolf, 181 U. S. 179, 21 Sup. Ct. 553, 45 L. Ed. 807; Bell v. Bell, 181 U. S. 175, 21 Sup. Ct. 551, 45 L. Ed. 804. This brings us to again consider a case heretofore referred to, principally relied upon as sustaining the contention that the domicil of one party alone is sufficient to confer jurisdiction upon a judicial tribunal to render a decree of divorce having extraterritorial effect, viz., Atherton v. Atherton, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794. The decision in that case, however, as we have previously said, was expressly placed upon the ground of matrimonial domicil. This is apparent from the following passage, which we excerpt from the opinion at page 171 of 181 U. S., 45 L. Ed. at page 803, and 21 Sup. Ct. at page 550:

"This case does not involve the validity of a divorce granted, on constructive service, by the court of a state in which only one of the parties ever had a domicil; nor the question to what extent the good

faith of the domicil may be afterwards inquired into. In this case the divorce in Kentucky was by the court of the state which had always been the undoubted domicil of the husband, and which was the only matrimonial domicil of the husband and wife. The single question to be decided is the validity of that divorce, granted after such notice had been given as was required by the statutes of Kentucky."

The contention, therefore, that the reasoning of the opinion demonstrates that the domicil of one of the parties alone was contemplated as being sufficient to found jurisdiction, but insists that the case decided a proposition which was excluded in unmistakable language. But, moreover, it is clear, when the facts which were involved in the Atherton Case are taken into view, that the case could not have been decided merely upon the ground of the domicil of one of the parties, because that consideration alone would have afforded no solution of the problem which the case presented. The salient facts were these: The husband lived in Kentucky, married a citizen of New York, and the married couple took up their domicil at the home of the husband in Kentucky, where they continued to reside and where children were born to them. The wife left the matrimonial domicil and went to New York. The husband sued her in Kentucky for a divorce. Before the Kentucky suit merged into a decree the wife, having a residence in New York sufficient, under ordinary circumstances, to constitute a domicil in that state, sued the husband in the courts of New York for a limited divorce. Thus the two suits, one by the husband against the wife and the other by the wife against the husband, were pending in the respective states at the same time. The husband obtained a decree in the Kentucky suit before the suit of the wife had been determined, and pleaded such decree in the suit brought by the wife in New York. The New York court, however, refused to recognize the Kentucky decree, and the case came here, and this court decided that the courts of New York were bound to give effect to the Kentucky decree by virtue of the full faith and credit clause. Under these conditions it is clear that the case could not have been disposed of on the mere ground of the individual domicil of the parties, since upon that hypothesis, even if the efficacy of the individual domicil had been admitted, no solution would have been thereby afforded of the problem which would have risen for decision, that problem being which of the two courts wherein the conflicting proceedings were pending had the paramount right to enter a binding decree. Having disposed of the case upon the principle of matrimonial domicil, it cannot in reason be conceived that the court intended to express an opinion upon the soundness of the theory of individual and separate domicil which, isolatedly considered, was inadequate to dispose of, and was, therefore, irrelevant to, the question for decision.

[The learned justice here reviewed the decisions of the state courts and concluded that they did not support the contention that decrees of divorce obtained in a state with jurisdiction alone of the plaintiff are,

by virtue of the full faith and credit clause of the Constitution, entitled to be enforced in another state as against citizens of such state.]

Without questioning the power of the state of Connecticut to enforce within its own borders the decree of divorce which is here in issue, and without intimating a doubt as to the power of the state of New York to give to a decree of that character rendered in Connecticut, within the borders of the state of New York and as to its own citizens, such efficacy as it may be entitled to in view of the public policy of that state, we hold that the decree of the court of Connecticut rendered under the circumstances stated was not entitled to obligatory enforcement in the state of New York by virtue of the full faith and credit clause. It therefore follows that the court below did not violate the full faith and credit clause of the Constitution in refusing to admit the Connecticut decree in evidence; and its judgment is, therefore, affirmed.[24]

[24] The dissenting opinions of Brown and Holmes, JJ., with whom concurred Harlan and Brewer, JJ., have been omitted.

"It does undoubtedly follow that the res—that is, the marriage relation—was as much in the state of New York as it was in the state of Connecticut, but it does not follow that the action of the Connecticut court with respect to that res is not as much obligatory in New York as in Connecticut. It is of the very essence of proceedings in rem that the decree of a court with respect to the res, whether it be a vessel, a tract of land, or the marriage relation, is entitled to be respected in every other state or country. The status fixed by the adjudication in the state of the former is operative everywhere." Brown, J., dissenting, 201 U. S. 616, 26 Sup. Ct. 546, 50 L. Ed. 889.

"There is no difference, so far as I can see, between Atherton v. Atherton and the present case, except that in Atherton v. Atherton the forum of the first decree was that of the matrimonial domicile, whereas in this the court was that of a domicile afterwards acquired. * * * I cannot see any ground for distinguishing between the extent of jurisdiction in the matrimonial domicile and that, admitted to exist to some extent, in a domicile later acquired." Holmes, J., dissenting, 201 U. S. 629, 631, 26 Sup. Ct. 552, 50 L. Ed. 894.

See, in general, 59 L. R. A. 135–187; 94 Am. St. Rep. 553–555; 6 Col. Law Rev. 449; 18 Harv. Law Rev. 215; 4 Mich. Law Rev. 534; Minor, Conflict of Laws, §§ 84–96; Joseph H. Beale, Jr., Constitutional Protection for Divorce, 19 Harv. Law Rev. 586–597; Henry Schofield, The Doctrine of Haddock v. Haddock, 1 Ill. Law Rev. 219–241.

+ many other cases.

The grounds for divorce are determined exclusively by the law of the forum. Wilcox v. Wilcox, 10 Ind. 436 (1858). Some courts refuse to take jurisdiction where the cause for divorce arose before the acquisition of a domicile by the libelant in the state of the forum. Norris v. Norris, 64 N. H. 523, 15 Atl. 19 (1888); Nicholas v. Maddox, 52 La. Ann. 1493, 27 South. 966 (1900).

MUNICIPAL JURISDICTION FOR DIVORCE.—"It is very evident, upon examining the statutes of the different states of the Union, that legislation vesting jurisdiction for divorce in their courts has followed no principle of general law in this respect whatsoever; some statutes making the jurisdiction, or supposing it, to depend upon the place of the contract, some upon the place of the delictum, and some, as in this state, and as they should do, upon the domicile of the wronged and petitioning party. The courts of each state exercise, as they must, jurisdiction upon the principles laid down for them by statute, and have very little occasion, unless called upon to review the decree of some neighboring state, to attend to or consider any general principles pertaining to the subject." Ames, C. J., in Ditson v. Ditson, 4 R. I. 87, 103 (1856).

ANNULMENT OF A VOIDABLE MARRIAGE.—See Minor, Conflict of Laws, § 78; 20 Harv. Law Rev. 412; 18 Law Quar. Rev. 231; Cummington v. Belchertown,

149 Mass. 223, 21 N. E. 435, 4 L. R. A. 131 (1889); Ogden v. Ogden [1908] Prob. 78.

CONTINENTAL LAW.—*France.*—As to municipal jurisdiction with respect to foreigners, see App. Paris, Jan. 14, 1896 (23 Clunet, 149); Trib. Civ. Lyon, Nov. 16, 1906 (2 Darras, 713). Such jurisdiction is deemed to relate to the person only. The lack of jurisdiction will be regarded as waived unless objection thereto is raised in time. App. Alger, Feb. 1, 1897 (25 Clunet, 352); App. Aix, April 27, 1903 (31 Clunet, 382); Trib. Civ. Lyon, Nov. 16, 1906 (2 Darras, 713). Whether a divorce or separation will be granted, if jurisdiction is assumed, will depend in the first place upon the national law of the parties. App. Paris, Dec. 31, 1907 (35 Clunet, 518); App. Paris, Jan. 30, 1908 (35 Clunet, 790). A divorce has been denied in accordance with this rule notwithstanding the marriage was celebrated in France. Cass. Feb. 12, 1895 (D. 1896, 1, 377). And even though the provisions of the national law were based upon religious considerations. Cass. May 29, 1905 (D. 1905, 1, 353); Cass. Oct. 30, 1905 (D. 1906, 1, 305), and note. For the same reason an application for the conversion of a decree of separation into one of absolute divorce has been denied, although the petitioner had since the granting of such decree reacquired the French nationality. Trib. Civ. Dieppe, June 19, 1905 (2 Darras, 515). It has also been held that the national law of the parties at the time of the marriage should govern. App. Alger, Jan. 27, 1892 (19 Clunet, 662); Trib. Civ. Seine, July 1, 1902 (30 Clunet, 163). A divorce will be granted to a person who has acquired the French nationality, notwithstanding the defendant remains the subject of a country which does not recognize divorce. Trib. Civ. Seine, June 18, 1896 (23 Clunet, 842); App. Alger, Dec. 13, 1897 (35 Clunet, 723); Trib. Civ. Bône, May 14, 1907 (35 Clunet, 466). Contra: App. Alger, Jan. 27, 1892 (19 Clunet, 662); Trib. Civ. Nice, Dec. 9, 1896 (24 Clunet, 333); App. Montpellier, Feb. 19, 1900 (D. 1901, 2, 25), and note by J. Valéry; Trib. Civ. Marseilles, June 27, 1907 (35 Clunet, 1129). The grounds for divorce or judicial separation are likewise determined with reference to the national law of the parties. Trib. Civ. Seine, June 5, 1891 (19 Clunet, 194); App. Rouen, June 30, 1897 (2 Darras, 511). Subject, however, to renvoi, Trib. Civ. Seine, May 7, 1908 (4 Darras, 627), and subject to the rules of public order (for example, if the national law should allow a divorce by mutual consent). See Trib. Civ. Marseilles, Feb. 21, 1902 (D. 1902, 2, 198). Indeed, it has been said that to grant a divorce for a ground not recognized by French law would of itself violate the French rules concerning public order. Trib. Civ. Blois, May 10, 1906 (4 Darras, 698). See, also, Trib. Civ. Pau, Nov. 2, 1907 (35 Clunet, 473).

A decree of divorce or separation granted by a foreign court to parties, both of whom are French subjects, will not be recognized. App. Paris, May 28, 1884 (11 Clunet, 622). It is not clear under what circumstances, in the absence of treaty, French courts will recognize a decree of divorce granted by the courts of a country to which both parties do not belong. This is particularly true when either of the parties is a French subject. See note to App. Paris, Nov. 2, 1906 (3 Darras, 199).

For the recognition of a foreign decree of divorce rendered by a competent court no exequatur is required, so long as no acts of execution are involved. App. Paris, April 6, 1903 (D. 1904, 2, 273). But where the parties are French an exequatur is needed for the registration of the foreign decree in France. App. Paris, Nov. 2, 1906 (3 Darras, 199).

Germany.—With respect to municipal jurisdiction where either party is or was a German subject, see section 606, pars. 1, 2, Code Civ. Proc. See, also, R. G. Jan. 7, 1906 (35 Clunet, 533). If both parties are foreigners, jurisdiction for divorce will be assumed only if it is authorized by the law of the country of which the husband is a subject. Section 606, par. 3, Code Civ. Proc. As a separation from bed and board is not recognized under German law, such a decree will not be rendered in favor of foreigners whose national law may admit of it. 55 R. G. 345 (Oct. 12, 1903). The national law of the husband at the time of divorce determines the grounds for which a divorce will be granted (article 17, par. 1, Law Intr. Civ. Code), subject to renvoi (article 27, Law Intr. Civ. Code). See, also, O. L. G. Ham. Dec. 19, 1905 (18 Niemeyer, 114). An act occurring while the husband possessed another nationality will be recognized as a ground for divorce or judicial separation only if it constitutes a ground also according to the law of such state. Ger-

man law applies if at the time of the suit the husband has lost his German nationality but the wife has retained hers. Article 17, par. 3, Law Intr. Civ. Code.

A divorce will not be granted in accordance with the national law where the cause is not recognized as a ground for divorce under German law. Article 17, par. 4, Law Intr. Civ. Code.

The recognition of a foreign decree of divorce is subject to the general provisions contained in section 328, Code Civ. Proc.

Italy.—The national law of the parties applies to all questions of status. Article 6, Prel. Disp. Civ. Code. But on principle Italian courts are incompetent to determine the status of foreigners. App. Milan, Feb. 15, 1876 (Monitore 1876, p. 318). Contra: App. Lucca, Dec. 11, 1872 (Annali 1873, 2, 93); Trib. Civ. Ancona, March 23, 1882 (Monitore 1882, p. 738). Since divorce is not allowed by the municipal law of Italy (article 148, Civ. Code) a decree of a foreign court granting a divorce to an Italian subject will not be recognized. Cass. Turin, June 6, 1894 (La Legge 1894, 2, 515). A decree of divorce pronounced by a competent foreign court with regard to foreigners whose law permits divorce will be recognized. Cass. Rome, Aug. 17, 1904 (33 Clunet, 514); App. Milan, Oct. 13, 1891 (S. 1892, 4, 29); App. Turin, Dec. 9, 1893 (S. 1894, 4, 9). And this is true notwithstanding the marriage was celebrated in Italy. App. Venice, Feb. 21, 1902 (Monitore 1902, p. 955); App. Palermo, Sept. 15, 1900 (La Legge 1901, 1, 230); App. Florence, Nov. 14, 1905 (La Legge 1906, 42). Contra: Cass. Turin, Nov. 21, 1900 (Monitore 1900, p. 981), semble.

There is considerable conflict on the question whether such a decree will be recognized when the marriage took place in Italy, one or both of the parties being at the time Italian subjects, who have since acquired another nationality. See note by F. Rey to Cass. Florence, Dec. 6, 1902 (30 Clunet, 910), and note to same case by G. C. Buzzati in La Legge 1903, 332.

The above rules are subject to the provisions of the Convention of the Hague of June 12, 1902. See Appendix A, II. See, also, Alfred Droz, De l' influence de la convention de la Haye du 12 Juin, 1902, sur les questions de divorce en France entre époux de nationalité différente, 34 Clunet, 19–28; Franz Kahn, Die Haager Scheidungskonvention, 15 Niemeyer, 125–264.

Custody of Children—Effect of Divorce upon Property—Alimony—American and Continental Law.—Jurisdiction to dissolve the marriage status does not include necessarily the right to dispose effectively of the custody of children or to award alimony. With respect to the custody of children, it appears that the actual residence of the children confers jurisdiction. Seeley v. Seeley, 36 Wash. Law Rep. 4 (1908). See, also, Minor, Conflict of Laws, § 96. On the continent the national law governs. *Italy*, Genoa, July 16, 1891 (Monitore 1891, p. 823). *France*, Trib. Civ. Laval, April 12, 1902 (29 Clunet, 1044). It has been held, however, that the matter falls within the police laws of the state and that the lex fori and the welfare of the child should control. App. Alger, Oct. 24, 1904 (2 Darras, 187); Trib. Civ. Seine, Nov. 29, 1904 (1 Darras, 671).

In order to render a valid personal judgment of alimony against a party who has not appeared in the divorce proceedings, personal service is required. Rigney v. Rigney, 127 N. Y. 408, 28 N. E. 405, 24 Am. St. Rep. 462 (1891); Prosser v. Warner, 47 Vt. 667, 19 Am. Rep. 132 (1875). It has been held, however, that such a decree against a nonresident will be binding within the state where it was rendered. Blackinton v. Blackinton, 141 Mass. 432, 5 N. E. 830, 55 Am. Rep. 484 (1886).

As to the effect of a valid divorce upon the dower rights of the wife in another state, see 59 L. R. A. 181–183; Barrett v. Failing, 111 U. S. 523, 4 Sup. Ct. 598, 28 L. Ed. 505 (1884); Gould v. Crow, 57 Mo. 200 (1874); Van Cleaf v. Burns, 118 N. Y. 549, 23 N. E. 881, 16 Am. St. Rep. 782 (1890).

As to the effect of a divorce upon the personal property of the parties, see 59 L. R. A. 183; McGrew v. Mutual Life Ins. Co., 132 Cal. 85, 64 Pac. 103, 84 Am. St. Rep. 20 (1901), writ of error dismissed in 188 U. S. 291, 23 Sup. Ct. 375, 47 L. Ed. 480, 63 L. R. A. 33 (1903); Carter v. Mutual Life Ins. Co., 10 Hawaii, 562 (1896).

In Germany the effect of divorce with respect to the duty to support (see K. G. Sept. 20, 1901, 12 Niemeyer, 124), and with respect to the property rights of the parties, is governed by the law applicable to the divorce, sub-

SECTION 3.—LEGITIMATION AND ADOPTION.

In re GROVE.

(Court of Appeal, 1889. 40 Ch. Div. 216, 58 L. J. Ch. 57.)

Further consideration.

This was an action for the administration of the estate of Caroline Emilia Grove, a domiciled Englishwoman, who died on the 29th of October, 1866, at the age of eighty-eight, a lunatic and intestate, and possessed of considerable personal estate.

In October, 1867, as no next of kin appeared to claim her estate, letters of administration were granted to the Solicitor to the Treasury; and the Treasury shortly afterwards took possession of the estate.

Two sets of persons subsequently set up conflicting claims to the estate as next of kin of the intestate, i. e. the Vaucher family and the Falquet family, and this action was brought by a member of the former family in 1884.

In the course of the proceedings an inquiry was directed as to who were the next of kin of the intestate, and evidence was gone into from which it appeared that both the Vaucher family and the Falquet family claimed through the same man, Marc Thomegay, and the same woman, Martha Powis, under the following circumstances:

Marc Thomegay, who was the grandfather of the intestate, was born in Geneva of Swiss parents, in the year 1712, and there was no question that his domicil of origin was Genevese. On the 13th of August, 1728, he was received as a burgess of Geneva. In 1729, his father, who was a watchmaker, died in Geneva. Marc Thomegay was a worker in gold and silver, and in 1734, being then twenty-two years of age, he came to England, where he remained until his death in 1779. In the year 1743, a private act of Parliament was passed, whereby Peter Thomegay, the brother of Marc Thomegay, and four other foreigners were naturalized as subjects of Great Britain, but this act did not include and made no mention of Marc Thomegay.

Some time after the arrival of Marc Thomegay in England, he formed a connection with an Englishwoman named Martha Powis; he cohabited with her for several years, and had by her three illegitimate children, viz., Sarah, who was born on the 5th of February, 1744, and was baptised on the 24th of the same month by the name of Sarah Thomegay, in the church of St. Mary, Whitechapel, where he presented her under his own name and as his daughter; a son was born on the 11th of January, 1745, and was baptised on the 16th of February following, in the same church; and another daughter, who was born on

ject, however, to the rules governing the matrimonial property régime. G. Planck, Bürgerliches Gesetzbuch, vol. VI, art. 15, 2 c.

the 14th of November, 1747, and was baptised on the 13th of December following, in the parish church of Barking in Essex. These two children were also baptised under their father's name, and as his children.

Sarah Thomegay, on the 19th of December, 1768, married M. Delom, a citizen of Vevey, and she was the ancestress of the Vaucher family.

Elizabeth Thomegay married a M. Courbel, a citizen of Geneva. On the 22nd of May, 1749, Marc Thomegay was married to an Englishwoman named Elizabeth Woodhouse, in the church of St. Pancras. Of this marriage there was issue one child, viz. Margaret Sarah Thomegay, who was born on the 22nd of December, 1749, and was baptised on the 13th of January, 1750, in the church of St. Leonard's, Shoreditch. Margaret Sarah Thomegay, on the 13th of June, 1788, married an Englishman named William Grove, and she died in London in the year 1792, having had issue one child only, viz., the intestate Caroline Emilia Grove.

Elizabeth Woodhouse died on the 26th of March, 1752, and on the 2nd of February, 1755, Marc Thomegay married Martha Powis, by whom he had formerly had the three illegitimate children above mentioned.

Of this marriage there was issue four children, one of whom died in infancy. The others were Jean, who was born on the 5th of October, 1756, and was baptised on the 29th of the same month in the church of Westham, Essex; Richard, who was born on the 11th of February, 1762, and was baptised on the 1st of March following, in the church of St. Leonard's, Shoreditch; and Sophie Martha, who was born on the 12th of November, 1764, and was baptised on the 7th of December following, in the same church.

Of these three children, Sophie Martha was the only one who left issue, and she in 1791, married Jean Louis Falquet, and was the ancestress of the Falquet family.

Martha Thomegay (née Powis) died in the year 1772.

In the year 1774 Marc Thomegay presented a petition to the Council of Geneva, apparently in the interest of his three children by Martha Powis before his marriage with her, in which he stated "that in 1734 he went to England, where he now is, that one of the first ties he formed was an attachment for Miss Martha Powis, whom he intended to marry as soon as fortune would allow him to do so; that thwarted by circumstances and encouraged by their intention to marry one another as soon as those circumstances would permit, they yielded and lived together for several years as husband and wife; that of this intercourse they had three children." Then after stating the names and dates of the births and baptisms of these children, as above set forth, he stated "that very extraordinary circumstances thwarted the resolution he had formed to marry Martha Powis, and induced him to marry Miss Elizabeth Woodhouse," and stated the death of his

wife Elizabeth and his subsequent marriage with Martha Powis. Then the petition stated, inter alia, that the petitioner having been informed that in Geneva, his native country, subsequent marriage legitimised illegitimate born children, made application in order to prove, by the certificates there mentioned, the births of his son Marc, and his daughters Sarah and Elizabeth, praying the Council to grant him record of his proofs and declarations, so that no one might question to his above mentioned three children, their condition of legitimate children in Geneva, his native country. An order was made by the Council granting record accordingly, and the births of these three children were entered in the register of births of children of Genevese parents born in foreign parts.

The statements contained in this petition were borne out by the certificates attached thereto, and these certificates were put in evidence in this action.

Marc Thomegay made his will on the 9th of March, 1779, describing himself as of Tottenham, in the county of Middlesex, and died on the 2d of December, 1779. From the will it appeared that he was carrying on business in partnership with his son, and was entitled to a leasehold house, workshops, and premises in Moorfields, within the parish of St. Leonard's, Shoreditch. It did not appear when this lease was granted, but in the baptismal certificates of 1744 and 1745 the parents were described as of Ayliffe street, and Moorfields was not mentioned in any certificate until the year 1750.

There was evidence that according to the laws of the canton of Geneva illegitimate children are legitimated by the subsequent marriage of their father and mother, notwithstanding the intervening marriage of their father with another woman.

The chief clerk, by this certificate made in this action, in substance left to the court the question whether under these circumstances Sarah Delom and the other two children born of Marc Thomegay and Martha Powis during their cohabitation were to be taken as legitimate or not; and found that if Sarah Delom ought to be treated as legitimate, then the next of kin of the intestate were the descendants of the said Sarah Delom, who were represented by the plaintiff, and that if not, such next of kin was the Falquet family.

The further consideration came on for hearing before Mr. Justice Stirling on the 20th of July, 1887.

[Here follow arguments of counsel and judgment by Stirling, J.]

The plaintiff appealed. The appeal came on for hearing on the 27th of July, 1888.

Fry, L. J.[25] I agree entirely with the conclusion arrived at by the

[25] The concurring opinions of Cotton and Lopes, L. JJ., and a part of the opinion of Fry, L. J., have been omitted. Cotton and Lopes, L. JJ., held that Marc Thomegay was domiciled in England at the birth of Sarah Thomegay, and that therefore she was incapable of being legitimized. In his concurring opinion Cotton, L. J., said in part:

"What is really necessary, I think, is that the father should at the time of

Lord Justice, and I am glad to say that I also agree in the law which he has laid down, but the facts of the case influence my mind somewhat differently, and I pick my way through those facts to the same conclusion by a somewhat different course. I will, therefore, endeavor to state, as briefly as I can, the view I take of this case.

The appellant claims through Sarah Thomegay, who was born in 1744, in this country, and was an illegitimate child of Marc Thomegay and Martha Powis. At birth that child took the domicil of its mother and it took the status of illegitimacy, according to the law of the domicil of its mother, and it took also the capacity to change that status of illegitimacy for one of legitimacy, provided that according to the law of the domicil of the father, the subsequent marriage would work legitimation. The position of such a child, therefore, is curious, taking domicil and status from the mother, but taking the potentiality of changing its status from the putative father. That I take to be the law applicable to this case, and that gives rise to the first question, what was the domicil of the father in the year 1744? According to my view of the case there is not sufficient evidence to lead me to the conclusion that the domicil of origin had been changed by Marc Thomegay. * * *

If his domicil were English, there would be an end of the case; if the domicil were Genevese, as I hold, then arises the second question, which is this: What was his domicil at the date of the subsequent marriage of the parents in 1755? It appears to me that the domicil governs the effects of the marriage. That I take to be the general law, and it is so laid down by Mr. Justice Story, in the 189th paragraph of his work on Conflict of Laws: "In a general sense the law of the matrimonial domicil is to govern in relation to the incidents and effects of marriage." If, therefore, the subsequent marriage was governed by the English domicil it would seem to follow that no legitimation can take effect. If, on the contrary, the subsequent marriage is governed by Genevese domicil it would seem that sub-

the birth of the child be domiciled in a country allowing legitimation, so as to give to the child the capacity of being made legitimate by a subsequent marriage. But it is the subsequent marriage which gives the legitimacy to the child, who has at its birth, in consequence of its father's domicile, the capacity of being made legitimate by a subsequent marriage.

"Where, then, must that marriage be? It is singular that there is, as far as I am aware, no express decision on that point. But this is probably because, as a rule, when the parties have been domiciled at the time of the birth in a country allowing legitimation of a child born before marriage, that same country has been their domicile at the time of their marriage. As I said before, the place of birth and the place of marriage is immaterial to the question of domicile. In the absence of authority the incidents and the effects of a marriage must, in my opinion, depend on the domicile of the parties at the time of the marriage; and it will be strange if a marriage in England, between persons domiciled in England, could produce any effect which by English law is not attributed in any way to marriage." 40 Ch. Div. 232.

sequent legitimation does take effect. It may be, though on this point no evidence has been adduced, that the Genevese law would recognize an English marriage as legitimating the previously born issue. Whether that be so or not I do not know, but even if it be, my conclusion is, that we should not follow the Genevese law, if it gave a greater effect to a marriage contract in England when the parents have an English domicil, than the English law gave to it; and for this reason, that the state imposes on all persons domiciled in it, its own conclusions as to the effect of marriage. Here again I would refer to the same paragraph in Mr. Justice Story's Conflict of Laws, where, citing the judgment of Lord Robertson, a Scotch judge, he says: "Marriage is a contract sui generis; and the rights, duties, and obligations which arise out of it are matters of so much importance to the well-being of the state, that they are regulated not by the private contract, but by the public laws of the state, which are imperative on all who are domiciled within its territory." I would remark again, that I entirely agree with what has been said by Lord Justice Cotton, with regard to the effect of the cases of Munro v. Munro, 7 Cl. & F. 842, and Udny v. Udny, Law Rep. 1 H. L. Sc. 441, on this question of law, and I think that they very strongly support the conclusion which I have endeavored to express.

Now, that being so, we come back to the question of fact, where was Marc Thomegay domiciled in 1755 when he contracted marriage with Martha Powis? In my judgment his domicil was English. I think we have a case in which residence, so far as we can tell, originally beginning sine animo manendi or even animo revertendi, has changed its character, and the animus manendi has grown up and been manifested in the meantime.

The facts from which I draw my conclusions are these: We have eleven years or more continuous residence in this country. We have, and on this I rely very greatly, a legitimate marriage contracted with an Englishwoman according to the rites of the English Church, and the birth of legitimate issue in this country, and their baptism according to the rites of the English Church. More than that, at the time of the second marriage he must be taken to have entered into another contract with an Englishwoman, this time casting aside the illicit contract which had existed between them and entering into a lawful contract of marriage. Further than that, there is the fact that by this time he had established himself in leasehold premises in Moorfields, apparently carrying on business on his own account. I think, therefore, taking the facts down to 1755, that the true conclusion from them is different from what it was in 1744; that at the later date he had abandoned his domicil of origin, and had assumed England as his domicil; and that consequently the English law of marriage must govern the effects of the marriage then contracted, and that English law would not allow subsequent legitimation. I come, therefore, to

the same conclusion, though by a somewhat different course, as that of my learned Brother. * * *

The appeal will be dismissed with costs.[26]

BLYTHE v. AYRES.

(Supreme Court of California, 1892. 96 Cal. 532, 31 Pac. 915, 19 L. R. A. 49.)

This action was instituted under section 1664 of the Code of Civil Procedure by Florence Blythe, a minor, through her guardian, to determine the heirship and title to the estate of Thomas H. Blythe, deceased. Plaintiff's claim is based upon sections 230, 1387, respectively, of the Civil Code of California. Section 230 reads as follows: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth." Section 1387 provides: "Every illegitimate child is an heir of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child." The facts found by the court were substantially (1) that plaintiff was born in England December 18, 1873, and was the issue of Thomas H. Blythe and Julia Perry; (2) Julia Perry was a native of England, domiciled therein and continued to reside there until one month after the death of Blythe; (3) that plaintiff remained in England until after the death of Blythe, when she came to California, and that Blythe was never at any time within any of the countries of Europe after August 29, 1873; (4) that said Blythe was a citizen of the United States and of the state of California, domiciled in said state, and died intestate therein, April 4, 1883, leaving surviving him no wife, no father, no mother, and no child, save and except Florence Blythe; (5) that Thomas H. Blythe and Julia Perry were never married, and plaintiff was begotten while Blythe was temporarily sojourning in England, and was born after Blythe's return to California, and that Blythe never was married.

Evidence was introduced showing that Blythe in his letters to the plaintiff had often spoken of her as his daughter and had provided means for her support and education.

The trial court found as a conclusion of law that Florence Blythe

[26] See, in general, 65 L. R. A. 177–187; Minor, Conflict of Laws, §§ 97–101. Though the lex domicilii of a deceased person will determine the classes of persons entitled to his personal estate, the membership of each class by reason of legitimacy will be determined by the law creating such a status. In re Goodman's Trusts, [1881] 17 Ch. Div. 266; In re Andros, [1883] 24 Ch. Div. 637. A person legitimated by the proper law may take also as a "child" under a devise of English realty. In re Grey's Trusts, [1892] 3 Ch. 88.

was legally adopted under the provisions of section 230 of the Civil Code and the lawful heir of Thomas H. Blythe.[27]

GAROUTTE, J.[28] [After holding that the word "adopts," used in section 230, was used in the sense of "legitimates," the learned justice continued:]

The section is broad in its terms. It contains no limitations or conditions, and, to the extent of the power vested in the legislature of the state, applies to all illegitimates, wherever located, and wherever born. The legislature has not seen fit to make any exception to its operation, and, as was said by Chief Justice Taney in Brewer v. Blougher, 14 Pet. 178, 10 L. Ed. 408, when considering a quite similar provision of a statute: "In the case before us the words are general, and include all persons who come within the description of illegitimate children; and when the legislature speaks in general terms of children of that description, without making any exceptions, we are bound to suppose they design to include the whole class." Bar, in his work on International Law (page 434) says: "Legitimation of bastards, either by subsequent marriage or by an act of the government (rescriptum principiis), is nothing but a legal equalization of certain children illegitimately begotten with legitimate children." In other words, the object and effect of section 230 is to change the status and capacity of an illegitimate child to the status and capacity of a child born in lawful wedlock.

This case, upon its facts, presumably stands alone in legal jurisprudence, for counsel in the exercise of great learning and unexampled industry have failed to parallel it. We have here a father at all times domiciled in the state of California, a mother at all times domiciled in England, and an illegitimate child born in England, and continuously there residing until the death of her father in California. As to the effect of our statutes upon such a state of facts, the consideration of the matter of domicile of these parties, and the principles of law applicable thereto, is a most important element to its proper determination, and it is a source of some satisfaction to be able to say that there are elementary principles pertaining to this subject of domicile, even though few in number, upon which practically all the text writers stand on common ground, to wit: (1) The domicile of the mother is the domicile of the illegitimate child, and the place of birth of the child is an immaterial element. (2) In a case of legitimatio per subsequens matrimonium the place of marriage does not affect the question. (3) Legitimation by a subsequent marriage depends upon the law of the domicile of the father. Dicey, Dom. p. 181, and other text writers, supported by many authorities, holding that the domicile of the father at the date of the birth is the vital

[27] The statement of facts has been abstracted from the opinion of Garoutte, J.

[28] Only a part of the opinion of Garoutte, J., is given.

inquiry, and other authority; Fras. Parent & Child, p. 52; Bar, Int. Law, p. 434; and Sav. Priv. Int. Law, p. 302—holding that the domicile of the father at the date of marriage is the determinative fact, inasmuch as the deceased, Blythe was domiciled in California both at the time of the birth of the child and at the time he performed the acts which it is claimed resulted in legitimation, this question does not become an issue in the case, and we are not called upon to dispel the clouds of doubt that envelope it.

The contention of appellants that the status of a person residing in a foreign country, and a subject thereof, cannot be changed by acts performed in California under a provision of the law of our state legislature, cannot be supported as a rule without many exceptions, and to the extent of those exceptions a state law must be held, by its own courts at least, to have extraterritorial operation; and this principle of the foreign operation of state laws even goes to the extent that in many instances such laws are recognized and given effect by the courts of that particular foreign jurisdiction. The doctrine of extraterritorial operation of state laws is fully exemplified in the case of Hoyt v. Thompson, 5 N. Y. 340. * * *

Section 215 of the Civil Code is as follows: "A child born before wedlock becomes legitimate by the subsequent marriage of its parents." This section takes a wide range. Its operation is not confined within state lines. It is as general as language can make it. Oceans furnish no obstruction to the effect of its wise and beneficent provisions. It is manna to the bastards of the world. If Blythe, subsequent to the birth of plaintiff, had returned to England, and married Julia Perry, such marriage, under the provision of law just quoted, ipso facto would have resulted in the legitimation of Florence Blythe. Then, in answer to the interrogatory of appellants already noticed, we say that she was so domiciled that by the laws of California she could have been changed from bastardy to legitimacy. Our statute, conjoined with principles of international law, would have changed her bastardy to legitimacy in the world at large; and regardless of international law, and regardless of all law of foreign countries, our statute law alone would have made her legitimate in the world at large, whenever and however that question should present itself in the courts of California. And we also have here a most striking illustration of the extraterritorial operation of California law. We have the effect of a statute of this state attaching to a state of facts where the mother and child were never in California, but residing and domiciled in England, and the marriage taking place in England; and California law, as stated, has the effect upon that child to give it a different domicile, and completely change its status. Such would not only be the effect of this law upon the child viewed by California courts, but such would be its effect viewed by the courts of England, where the child was domiciled, and that, too, notwithstanding no provisions of law are there found for the legitimation of bastards. This assumption

of Blythe's marriage to Julia Perry in its facts forms an exact photograph of the celebrated case of Munro v. Munro, found in 1 Rob. Scot. App. H. L. 492; a case crystallizing the judicial thought of the age upon the subject, and commanding the respect of all writers and judges upon the law of domicile. * * *

Appellants insist that the domicile of the child irrevocably fixes that child's status. In this case, subsequent to the child's birth, Julia Perry married a domiciled Englishman; hence her domicile was permanently established in England, and for that reason the child's domicile, being the mother's domicile, was permanently established there. Under appellants' reasoning this state of facts would forever debar the child from legitimation, for even its presence in California would avail nothing as against its English domicile. If such be good law, section 226 of the Civil Code, expressly authorizing the adoption of minors of other states, is bad law, for it is squarely in conflict with those views.

We find in Story's work upon Conflict of Laws (section 105a) the following: "Sixth. As to issue born before the marriage, if by the law of the country where they are born they would be legitimated by the subsequent marriage of their parents, they will, by such subsequent marriage, (perhaps in any country, but at all events in the same country,) become legitimate, so that this character of legitimacy will be recognized in every other country. If illegitimate there, the same character will belong to them in every other country." But Judge Story's citations in its support do not clearly bear him out, and legal authority to the effect that the place of birth forms no element in the case vastly preponderates.

[The learned justice here examined Loring v. Thorndike, 5 Allen, 257, In re Grove, L. R. 40 Ch. Div. 216, Shedden v. Patrick, 1 Macq. 535, Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321, Miller v. Miller, 91 N. Y. 315, 43 Am. Rep. 669, Birtwhistle v. Vardill, 2 Clark & F. 840, Foster v. Waterman, 124 Mass. 592, Lolley's Case (1812) Russ. & R. 237, and Hawbecker v. Hawbecker, 43 Md. 516, and continued as follows:]

We have quoted thus extensively from the authorities upon the subject of domicile as especially bearing upon the question of legitimatio per subsequens matrimonium for the reason that we are unable to perceive any difference in the general principles of law bearing upon that character of legitimation and in those principles bearing upon other forms of legitimation authorized by the same statute. The only distinction claimed by appellants is that legitimation founded upon subsequent marriage is based upon the fiction of law that a previous consent existed, and the marriage related back to that time. Upon this point it would seem all-sufficient to say that our statute does not recognize such a fiction, and its effective operation in no wise depends upon the assumption of its presence. Times are not what they once were, and we live in an age too practical to build our law upon the unstable foundation of fictions. In Birtwhistle v. Vardill, 2 Clark &

F. 840, Lord Chief Justice Tyndal, in speaking upon this question, says: "Pothier, on the other hand, when he speaks of the effect of a subsequent marriage in legitimating children born before it, disclaims the authority of the canon law; nor does he mention any fiction of an antecedent marriage, but rests the effect upon the positive law of the country. He first instances the custom of Troyes, and then adds * * * that it is a common right received throughout the whole kingdom." Schouler, Dom. Rel. § 226, says: "The principle to which the law of legislation per subsequens matrimonium is to be referred has been a subject of controversy. The canonists base the law, not on general views of expediency and justice, but upon a fiction, which they adopted in order to reconcile the new law with established rules, for, assuming that as a general rule children are not legitimate unless born in lawful wedlock, they declared that by a fiction of law parents were married when the child was born. Such reasoning—by no means uncommon when the wise saw more clearly what was right than why it was so—has not stood the test of modern logic, and the Scotch courts have placed the rule once more where its imperial founders left it, namely, on the ground of general policy and justice."

Upon principle no distinction can be made between the rules of law applicable to these various forms of legitimation. Many of the states of this Union, in order to effect those ends, require, in addition to a subsequent marriage, that the father (in some states both father and mother) shall also acknowledge the child. * * *

Legitimation is the creature of legislation. Its existence is solely dependent upon the law and policy of each particular sovereignty. The law and policy of this state authorize and encourage it, and there is no principle upon which California law and policy, when invoked in California courts, shall be made to surrender to the antagonistic law and policy of Great Britain. It was said in Munro v. Munro, 1 Rob. Scot. App. H. L. 492: "We are here in a Scotch question, and in a Scotch court applying a plain rule of our law, and unless that law says that, if a child be born in England, it shall not have the benefit of the rule, we do not see how that it is at all material that it could not enjoy it if the law of England were to be applied to the case;" and again: "We are not inquiring what the law of England might decide if the person were making a claim in an English court of law in respect of property within their jurisdiction." And we say here plaintiff was the child of Blythe, who was a domiciled citizen of the state of California. She founds her claim upon the statutes of this state, and is now here invoking the jurisdiction of the courts of this state. It is a question of California law, to be construed in California courts, and we see nothing in our constitution or statutory law, or in international law, to have prevented Blythe from making the plaintiff his daughter in every sense that the word implies. In conclusion, we hold that Blythe, being domiciled in the state of California both at the time of the birth of plaintiff and at the time he performed the

acts which it is claimed resulted in the legitimation of plaintiff, and California law authorizing the legitimation of bastards by the doings of certain acts, it follows that Florence Blythe, the plaintiff, at all times was possessed of a capacity for legitimation under section 230 of the Civil Code of this state.

[The learned justice here examined the evidence and concluded that the acts of Blythe brought Florence within the requirements of section 230 of the statute.]

Judgment affirmed.[29]

IRVING v. FORD.

(Supreme Judicial Court of Massachusetts, 1903. 183 Mass. 448, 67 N. E. 366, 65 L. R. A. 177, 97 Am. St. Rep. 447.)

LATHROP, J. The question which arises in this case is that left undecided when the parties were before us on a petition to the probate court to amend the record of a petition for administration of the estate of Robert Irving, otherwise known as Sheridan W. Ford, by substituting the name of the petitioner and his mother as the next of kin, and to remove the administrator appointed on an earlier petition. See Irving v. Ford, 179 Mass. 216, 60 N. E. 491. The case is now before us on an appeal from a decree of the probate court on a petition asking that the petitioner be allowed one-third of the estate of Sheridan W. Ford, claiming to be entitled thereto as a son.

For the purposes of this case, it must be considered as settled by the previous decision that the so-called marriage between the petitioner's father and mother in Virginia while both were slaves was void, and that the marriage between the common father of the petitioner and of the respondent in Massachusetts was valid, and that the respondent, and not the petitioner, is the legitimate son of Sheridan W. Ford, unless the statute of Virginia passed on February 27, 1866, makes him a legitimate child in this state. This statute declared that all colored persons cohabiting together on February 27, 1866, should be deemed husband and wife, and all their children legitimate, whether born before or after the passage of the act. The father and mother of the petitioner were not then cohabiting together, and the petitioner's claim is based upon the last clause of the act, which reads as follows: "And when the parties have ceased to cohabit before the passage of this act, in consequence of the death of the woman, or from any other cause, all the children of the woman, recognized by the man to be his, shall be deemed legitimate." Acts 1865–66, p. 85, c. 18, § 2. At the time of the passage of this act the petitioner's domicile was in Virginia, and the domicile of Sheridan W. Ford was in Massachusetts.

[29] Patterson and Sharpstein, JJ., concurred. McFarland and De Haven, JJ., concurred upon the ground that plaintiff was the heir of Blythe under section 1387 of the Civil Code. Beatty, C. J., and Harrison, J., did not sit.

We are unable to see any ground upon which the state of Virginia can impose upon a person having his domicile in Massachusetts a legitimate son, when by our law he is illegitimate. By our law it is provided, "An illegitimate child whose parents have intermarried, and whose father has acknowledged him as his child, shall be considered legitimate." Pub. St. 1882, c. 125, § 5 (Rev. Laws, c. 133, § 5). The Virginia act makes mere acknowledgment sufficient, while our law requires both marriage and acknowledgment. The law which governs this case is well stated by Mr. Minor in his treatise on the Conflict of Laws, § 100. After stating the question, which domicile should govern when the act of legitimation is not marriage, but mere acknowledgment, or a statute of a state, and the bastard has his domicile in one state, and his father in another, he proceeds: "Two points should be noticed in this connection, which will aid us to determine the proper law in this case. The first is that the legitimation of a bastard is the creation of a status which is beneficial to him, and it should be presumed in his favor whenever adequate reason exists for such a course. The second is that this beneficial status cannot be accorded the infant at the expense of a change of status on the part of the father not warranted by his domiciliary law. Applying these two principles, it follows that the law of the father's domicile at the time of the legitimating act will be the proper law to determine the status of both parties. If by that law the act in question legitimates the bastard, the beneficial status thus created will in general be recognized everywhere, including the bastard's domicile, though by the law of the latter state the act would not suffice to create a legitimation. On the other hand, if, by the law of the father's domicile, legitimation is not the result of the act claimed to have that effect, though, under the bastard's domiciliary law, legitimation would result therefrom, the status of legitimation should not be conferred upon the bastard, for that would be to subject the status of the father to a law to which it is not properly subject." In Lingen v. Lingen, 45 Ala. 410, the domicile of the father was in Alabama. The illegitimate child was born in France, having a French woman for its mother. The father, while in France, acknowledged the child to be his, but he did not marry the woman. This acknowledgment was sufficient in France to make the child legitimate, but not in Alabama. It was held that the legitimation was governed by the law of the father's domicile, and not by that of the bastard. See, also, Wharton, Confl. of Laws, § 246. So in Loring v. Thorndike, 5 Allen, 257, 263, where a citizen of this commonwealth had an illegitimate child born in Germany, and afterwards married the mother in that country, and acknowledged the child there, the legitimacy of the child was determined by the provision of Rev. St. 1836, c. 61, § 4. See, also, Morris v. Williams, 39 Ohio St. 554; Blythe v. Ayres, 96 Cal. 532, 31 Pac. 915, 19 L. R. A. 40.

It may be conceded that if the father of the petitioner had been domiciled in Virginia in 1866, when the statute in question was passed,

or when he acknowledged the petitioner as his son, the petitioner would have acquired a status as a legitimate son which would be recognized here. Scott v. Key, 11 La. Ann. 232; Miller v. Miller, 91 N. Y. 315, 43 Am. Rep. 669. See, also, Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321. There are, however, decisions to the contrary. Smith v. Derr's Adm'rs, 34 Pa. 126, 75 Am. Dec. 641; Williams v. Kimball, 35 Fla. 49, 16 South. 783, 26 L. R. A. 746, 48 Am. St. Rep. 238.

But as the petitioner's father, when the statute was passed and when the acknowledgment was made, was domiciled in this commonwealth, the question of the petitioner's legitimacy must be determined by our law, which does not recognize acknowledgment alone as legitimation; and the order must be: Decree of probate court affirmed.

MILLER v. MILLER.

(Court of Appeals of New York, 1883. 91 N. Y. 315, 43 Am. Rep. 669.)

This was an action of ejectment.

MILLER, J. By the statute of this state the real estate of an intestate passes in the first instance to his lineal descendants. Rev. St. (1st Ed.) pt. 2, c. 2, tit. 5, §§ 1, 2. It is also provided that "children and relatives who are illegitimate shall not be entitled to inherit." Rev. St. (1st Ed.) § 19. The plaintiff is a child of the deceased under whom he claims and one of his lineal descendants. He was born in the kingdom of Wurtemburg in the year 1845, before the marriage of his parents, and the question to be determined is whether he was legitimate at the time of the death of his father. At the time of his birth his father and mother were domiciled and resided at Wurtemburg. A statute found in the Laws of 1610 of that kingdom at title 17, § 4, is as follows: "Whatever is decreed in the foregoing title regarding the inheritance of children born in lawful wedlock shall be applicable also to such children as are begotten of two persons unmarried (but not too closely related for their bethrothal or lawful conjugal cohabitation) and who first became legitimate by a subsequent marriage of their parents, shall be held equal to those children who are born in lawful wedlock as regards the right of inheritance from its parents, brothers and sisters and other relatives as in all other respects." Any subsequent marriage of the parents of the plaintiff would, therefore, render him legitimate at the place of his birth and the domicile of himself and parents—Wurtemburg, and if the father had resided at Wurtemburg at the time of his decease, plaintiff would have been one of his lawful descendants, the same as though he had been born in wedlock.

The plaintiff with his parents subsequently removed to the state of Pennsylvania, and his father became a citizen of the United States

by naturalization, and while domiciled there and in the year 1853 his parents were lawfully married. In 1862 the family removed to this state, where they lived until the death of the father in 1875. The real estate in question was purchased by plaintiff's father after his removal to this state and he owned the same in fee at the time of his death.

We think that by the law of the domicile of the plaintiff's birth, Wurtemburg, and by the subsequent marriage of his parents, the plaintiff was legitimated in the state of Pennsylvania. Be that as it may, however, in the year 1857 a law was passed by the Legislature of the state of Pennsylvania which declared that: "In any and every case where the father and mother of an illegitimate child or children shall enter into the bonds of holy wedlock and cohabit, such child or children shall thereby become legitimated and enjoy all the rights and privileges as if they had been born during the wedlock of their parents." See Brightly's Purdon's Digest (Ed. 1873) 1004, § 9. The above act was followed by an act passed in 1858, by which the provision cited was made applicable to all cases arising prior to 1857, unless some interest had become vested. As the real estate which is the subject of this controversy had not been acquired prior to the acts referred to, no vested interest existed which conflicted with the acts cited. It is very evident that the plaintiff after the passage of the above laws was a legitimate child and entitled to all the rights and privileges of a lineal descendant of his parents. If his father had died in the state of Pennsylvania seized of real estate it cannot be questioned that any doubt would arise in regard to his claim thereto. He was invested with all the rights of a citizen entitled to inherit such portion of his father's estate as the law allowed to legitimate children. Occupying this position can it be said that the plaintiff lost such right because his father moved out of the state of Pennsylvania and located in the state of New York? Could he be legitimate in one state and illegitimate in another? Such a rule would render the right of inheritance, sanctioned by the law of the state where he resided, one of great uncertainty and fluctuation, and in many cases it would operate so as to produce great injustice. While the power of the Legislature is paramount unless restricted by constitutional authority, it should not be upheld where its effect may be to produce great wrongs, unless imperatively demanded. Any other rule would leave the plaintiff, whose status was fixed by the laws of Pennsylvania, subject to the change of statutes in any state where he might have occasion to reside, whose laws differed from the former state. Assuming that the plaintiff by the laws of the state of Pennsylvania was legitimate, the question arises whether that legitimacy was carried with him when his father and family removed to the state of New York. If the plaintiff labored under any disability in the state of New York it arose by reason of the provisions of law contained in the statutes of that state already cited. Rev. St. (1st Ed.) pt. 2, c. 2, tit. 5, § 19.

The law-making power can declare a child born to be legitimate or illegitimate, and it is only that power which fixes and determines the status of children born. If born before marriage the Legislature can remove the disability of its illegitimacy, and by its transcendant power can legitimatize and make capable of inheriting the illegitimate child. Blackstone, 4 Inst. 36. If this had been done by an act of the Legislature of the state of New York, no question could arise as to the legitimacy of the plaintiff or his right to inherit. The statutes of this state, to which we have referred, do not contain the words "born out of wedlock," or the word "bastard." The English statute of Merton, so called (St. 20 Hen. III, c. 9), not only required that a child, in order to inherit, should be legitimate, but also that "he should be born in lawful wedlock as well." This constitutes a marked difference between that statute and the statute of this state cited supra. Legitimacy, which was conferred upon the plaintiff by the laws of Pennsylvania, to which reference has been had, constituted a portion of his rights and accompanied him wherever he might reside. Being legitimate in the state of Pennsylvania, he continued so in every state and in every country where he chose to establish his residence. The rule seems to be well settled that the law of the domicile of origin governs the state and condition of a person in whatever country he may remove to. The status of legitimacy which arises under the law of one nation is recognized by other nations according to the authorities. Story lays down the rule in his Conflict of Laws (section 93) that "foreign jurists generally maintain that the question of legitimacy or illegitimacy is to be decided exclusively by the law of the domicile of origin." He also says at section 93b: "It seems admitted by foreign jurists, that as the validity of the marriage must depend upon the law of the country where it is celebrated, the status or condition of their offspring, as to legitimacy or illegitimacy, ought to depend on the same law, so that if by the law of the place of the marriage the offspring, although born before marriage, would be legitimate, they ought to be deemed legitimate in every other country for all purposes whatever, including heirship of immovable property." Wheaton, in his Law of Nations, at page 172, says: "Legitimacy or illegitimacy are among universal personal qualifications, and the laws of the state affecting all these personal qualities of its subjects travel with them wherever they go and attach to them in whatever country they may be resident." The general current of authority favors the doctrine that where an illegitimate child has been legitimated by the subsequent marriage of its parents according to the laws of the state or country where the marriage takes place and the parents are domiciled, such legitimacy follows the child wherever it may go. This rule is, as we have seen, fully sustained by the authorities to which we have referred. The learned Judge Story, in his Conflict of Laws, devotes nearly the entire fourth chapter, and no inconsiderable portion of the work, to the consideration of the question involved in the case at bar,

and he asserts the rule, that if a person is legitimated in a country where domiciled, he is legitimate everywhere and entitled to all the rights flowing from that status, including the right to inherit. He arrives at this conclusion after an examination and exhaustive discussion of the subject and after a comparison of the views of different writers upon civil law, quoting extensively from the same.

In support of the same general doctrine which has been discussed are the following authorities: Smith v. Kelly's Heirs, 23 Miss. 170, 55 Am. Dec. 87; Scott v. Key, 11 La. Ann. 232; Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321; In re Goodman's Trust, Law Reports, 17 Chancery Div. 266; Van Voorhis v. Brintnall, 86 N. Y. 18, 40 Am. Rep. 505.

The decision of this court might well rest upon the principle asserted in the authorities already cited without regard to the cases which are claimed to hold a contrary rule. It is enough to say that the right of inheritance under circumstances like these here presented rests upon a principle which is founded upon a rule of ancient origin, reasonable in itself and in accordance with the well being of society and a due regard to the right of persons, and that it is fully sustained by the weight of authority. The celebrated case of Birtwhistle v. Vardill, reported in 11 Eng. C. L. 266, also in 2 Clark & Fin. 581, 7 Clark & Fin. 895, and 9 Bligh, 7, involved a question of similar character to that presented in the case at bar, and is specially relied upon by the respondent's counsel. It was there held that a child born in Scotland, of unmarried parents domiciled in that country, and who afterward intermarried there, is not by such marriage rendered capable of inheriting lands in England. By the Scottish law the marriage legitimated the child. It was laid down by the chief baron on behalf of the court that the comity existing between nations is conclusive to give the claimant the character of the eldest legitimate son of his father and to give him all the rights which are necessarily consequent upon that character. Thus sustaining the general doctrine that by the comity between different nations the laws of one should be recognized by the other in reference to rendering children of parents born out of wedlock legitimate, but it further held that the son could not inherit in England, for the reason that although he was legitimate he was not born in wedlock. The distinction between being legitimate and being born in wedlock would seem to be a narrow one, and it is difficult to see how it can be urged that a person can be made legitimate although born a bastard, and yet for the purpose of inheriting real estate be illegitimate because not born in wedlock. The particular phraseology of the statute of Merton, so called, had much to do with this limited and narrow construction, and it is but fair to assume that if the term "born in wedlock" had been excluded the right of inheritance would have been maintained. It was said in that case by Bayley, J., that "the right to inherit land depends upon the quality of the land and not upon any personal statutes." It would thus seem that the

case was decided upon the peculiar laws governing real estate in England and especially upon the statute of Merton. It was twice argued in the House of Lords (2 Clark & Fin. 581; 7 Clark & Fin. 895), and eventually decided upon the sole ground that although a child born in Scotland before the marriage of his parents would become legitimate by the subsequent marriage of said parents, yet he could not inherit in England, for the reason that the English statute does not only require that the child be legitimate, but that he must also be born in wedlock. This distinction was strongly criticised by Lord Brougham, one of the ablest of English jurists, and one of the judges in that case when last heard. He says: "If what is laid down in this case be law the bounds of that law are very narrow; if it is the law anywhere it prevails assuredly only as the law within the bounds of Westminister Hall. I know, wherever I go in Europe, it is boldly denied to be the law. I know the opinion of Dr. Story and other American jurists is against us, and I do not think I could overstate the degree in which all these jurists dissent from the judgment in this case." See 7 Clark & Fin. 915. Wharton in his Conflict of Laws (section 241), says in regard to this case, "the opinion was based on the special ground that the English law as to the descent of honors and real property was of a positive and distinctive character, and could not be invaded by the prescription of a foreign jurisprudence." Parsons in his work on Contracts in commenting on this case says: "We think such a marriage in Scotland, supposing parents and child afterward come to America and be naturalized here, would be held here to make the child an heir as well as give him all other rights of legitimacy."

The case of Smith v. Derr's Adm'rs, 34 Pa. 126, 75 Am. Dec. 641, arose under a statute of Pennsylvania similar to the statute of Merton, and was disposed of in a very brief opinion upon the authority of the case of Birtwhistle v. Vardill, supra.

The case of Lingen v. Lingen, 45 Ala. 410, is contrary to the general current of authority, and should not, we think, be followed.

When the state of Pennsylvania, by its Legislature, declared that "in any and every case when the father and mother of an illegitimate child or children shall enter into the bonds of holy wedlock and cohabit, such child or children shall thereby become legitimate and enjoy all the rights and privileges as if they had been born during the wedlock of their parents," it did not mean that persons who were born illegitimate would only be legitimate if born in lawful wedlock. Its intention was to legitimatize the offspring of those who were unmarried at the time of the birth of their child, and any other construction would lead to the making of provision for children lawfully born instead of those who were illegitimate. To hold a different rule would nullify the law and be contrary to the interpretation usually given to remedial statutes of the character of the one considered.

We do not deem it necessary to consider the question as to the

definition of the word "legitimate." Whether it embraces "born out of wedlock" is in our opinion not material, as under the authorities we have cited a child thus born may be made legitimate by law, and its legitimacy recognized in other countries besides the domicile of its parents, by the comity of nations. We think we have fully established this proposition, and, although there are some authorities which hold differently, they are not sufficient to overturn the doctrine laid down in the elementary books and reported cases.

The case of Birtwhistle v. Vardill is so limited and restricted that it must be held only to apply to the law as established in Great Britain. We have examined the other authorities not specially referred to, which have been cited by the respondents' counsel, and we think none of them are in conflict with the rule we have laid down.

In our opinion the judgment of the General Term was erroneous, and should be reversed, and a new trial granted, with costs to abide the event. All concur.

Judgment reversed.

OLMSTED v. OLMSTED.*

(Court of Appeals of New York, 1908. 190 N. Y. 458, 83 N. E. 569.)

HAIGHT, J. This action was brought to obtain a partition or sale of real estate claimed by the appellants as tenants in common, and for a determination of the rights of the parties to share in the proceeds of any sale that should be made thereof.

It appears, in substance, from the findings made by the trial court, that the real estate in question was formerly owned by one Silas Olmsted, late of Tarrytown, N. Y., who died in 1874, leaving a last will and testament with codicils attached which were admitted to probate, by which he devised the use of the property to his sons, William F. and Benjamin Franklin, during their natural lives, and upon their death the remainder was to vest in the "lawful issue of each of my said sons, such issue to take share and share alike; the children of any deceased child of either of my said sons to take the share their parent would have taken if living." Benjamin F. Olmsted, one of the sons of the decedent to whom a life interest in the real estate in question had been given by the testator, was married to Mary J. Olmsted in the state of New York on the 25th day of December, 1850, by whom he had four children, to wit, the plaintiff, Daniel H. Olmsted, and the defendants Mary O. Decker, Clarence E. Olmsted, and Frank S. Olmsted. Benjamin F. and his wife, Mary, were residents of the state of New York at the time of their marriage, and at the time their children were born, and Mary continued to be a resident of this state until her death, on the 22d day of January, 1902. It further appears from the finding that on the 28th day of February, 1874, Benjamin F. Olm-

*Affirmed by the Supreme Court of the United States in 216 U. S. 386, 30 Sup. Ct. 292, 54 L. Ed. 530, 25 L. R. A. (N. S.) 1292 (1910).

sted joined in a marriage ceremony with one Sarah Louise Welchman in the state of New Jersey, by whom he had two children, who were the defendants John E. Olmsted and William H. Olmsted, and that thereafter, during the summer of 1880, they removed to the state of Michigan, and on the 10th day of February, 1882, in the circuit court of Wayne county, Mich., on the application of Benjamin F. Olmsted, reciting that he then was and had been for more than a year a resident of the state of Michigan, procured a subpœna to be issued, directing Mary Jane Olmsted, his former wife, to appear and defend an action brought by him for divorce under the law of the state of Michigan, on account of extreme cruelty and desertion; that the subpœna was never personally served upon Mary J. Olmsted, and on proof that she was not a resident of the state of Michigan, but was a resident of the state of New York, service thereof was ordered to be made by publication in a Detroit paper. After the period of publication prescribed by the order had expired, the said Mary Jane Olmsted not having appeared or answered, judgment was entered in favor of said Benjamin F. Olmsted for a dissolution of the marriage, and thereafter, on the 22d day of August, 1882, in the city of Detroit, Mich., Benjamin F. Olmsted again joined in a marriage ceremony with the said Sarah Louise Welchman, and lived with her until the time of her death, January 30, 1900; that in June, 1883, Mary Jane Olmsted commenced an action in the Supreme Court in the state of New York against Benjamin F. Olmsted and others, setting forth in her complaint that in June, 1870, Benjamin F. Olmsted deserted and abandoned her and her children at Newburgh, N. Y., and took up his abode in New Jersey, and demanded a decree of separation against him and asking for alimony and counsel fee, and the application of the property of the said Benjamin F. Olmsted for the purpose of furnishing the money required therefor; that in that action the judgment roll shows that Benjamin F. Olmsted was represented by an attorney on a motion for the sequestration of his property to pay the alimony, etc., decreed in the judgment; and that on the 22d day of January, 1885, judgment was entered in that action for the plaintiff Mary Jane Olmsted and against the defendant Benjamin F. Olmsted, separating Mary Jane from him and requiring the payment by him of alimony and counsel fees; that thereafter an appeal was taken from the judgment so entered to the General Term of the Supreme Court, in which the judgment was affirmed. Benjamin F. Olmsted died July 16, 1905, and thereupon his lawful issue became entitled to the real estate as remaindermen. The trial court found as conclusions of law that the lawful issue of Benjamin F. Olmsted were the plaintiff, Daniel H. Olmsted, and the defendants Mary O. Decker, Clarence E. Olmsted, and Frank S. Olmsted; that the defendants John H. Olmsted and William H. Olmsted, the children of Benjamin F. Olmsted and Sarah Louise Welchman, were not the lawful issue of Benjamin F. Olmsted, and were not entitled to any share in the

said property. The Appellate Division has modified the judgment, holding that the defendants John H. Olmsted and William H. Olmsted are the lawful issue of Benjamin F. Olmsted, and are entitled to share in the said property.

Under the common law the legitimacy or illegitimacy of a person was determined by the law of the country in which he was born. If by the law of that country he was legitimate, he should be deemed legitimate everywhere. If, however, by that law he was illegitimate, then he should be deemed illegitimate in every other country. There were some exceptions; for instance, if the parents were citizens or representatives of some foreign country, passing through or temporarily staying in the country of the birth. But these exceptions do not arise in the case under consideration, and are not necessary to be now considered. In some of the countries of Europe there were laws under which illegitimate children became legitimate by the subsequent marriage of their parents. This was the case in France, and its courts consequently held that a child born out of wedlock in its country became legitimate by a subsequent marriage of its parents, although the marriage took place in England, where a different law prevailed, and where a subsequent marriage would not have the effect of rendering the child legitimate. See Story on Conflict of Laws (Redfield Ed.) §§ 93, 93s, and other authorities cited. In this state the law is now settled in accordance with the French rule, that, when an illegitimate child has by the subsequent marriage of his parents become legitimate by virtue of the laws of the state or country where such marriage took place and the parents were domiciled, he is thereafter legitimate everywhere, and is entitled to all of the rights flowing from that status, including the right to inherit, notwithstanding the fact that he was born in another country. Miller v. Miller, 91 N. Y. 315, 43 Am. Rep. 669. Recently many of our sister states have adopted statutes similar to those of France, providing that the subsequent marriage of the parents legtimatized the child or children previously born. Such a statute was adopted in Michigan in 1881 (Laws 1881, p. 48, No. 55), and in this state in 1895 (Laws 1895, p. 313, c. 531). These statutes, however, were passed long after the death of Silas Olmsted and the admitting of his will to probate, under which his legitimate grandchildren became vested as remaindermen in the estate left by him, subject to the life use by their father. But the statutes to which we refer, both in this state and in Michigan, only relate to such marriages between parents as may be lawfully made, and not to those which are polygamous, incestuous, or are prohibited by law. See Story on Conflict of Laws, §§ 113a, 114.

In the case of Adams v. Adams, 154 Mass. 290, 28 N. E. 260, 13 L. R. A. 275, a testator in Massachusetts bequeathed property to the wife of his brother "for the benefit of herself and all the children of such brother." Thereafter the brother went to California and obtained a divorce from his wife without living there the requisite time, or of

giving her notice. He then married another woman, by whom he had previously had an illegitimate son. Under the Code of California, children begotton before marriage were legitimatized by subsequent marriage of the parents. The illegitimate son, claiming to be legitimatized by the Code of California, brought an action in equity to establish his share in the fund left by the testator for the benefit of the wife and all the children of the testator's brother. The action was dismissed, the court holding that the validity of the divorce might be inquired into, notwithstanding the recitals in the record; that the marriage was void and did not legitimatize the plaintiff, and consequently he was not entitled to take under the will. That case, in many respects, is similar to this case. As we have seen, Benjamin F. Olmsted was a resident of this state, married here, and had four children. He then left his family and went to New Jersey, where he lived with another woman, by whom he had two sons. These children were concededly illegitimate. He then removed to Michigan, brought an action against his wife for divorce, who was still living in the state of New York, and procured a decree in that court annulling the marriage upon the ground that his wife had deserted him, without personal service upon her of process or other notice of the commencement of the action. He then married the mother of his two illegitimate children.

While the courts of this state are required to give full faith and credit to the decrees of the courts of our sister states, we have the right to inquire as to whether such courts had obtained jurisdiction of the person and the subject-matter; and, if we find that they had not obtained jurisdiction, then their judgment or decrees become of no force or effect. Matter of Kimball, 155 N. Y. 68, 49 N. E. 331; Winston v. Winston, 165 N. Y. 555, 59 N. E. 273; Haddock v. Haddock, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867; Atherton v. Atherton, 155 N. Y. 129, 49 N. E. 933, 40 L. R. A. 291, 63 Am. St. Rep. 650; Id., 181 U. S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794. The Michigan courts never obtained jurisdiction of Benjamin F. Olmsted's wife, a resident of this state. She had no notice, and consequently did not appear in the action. The ground upon which the divorce was sought was one not recognized by the laws of this state as a ground for divorce. It was a decree such as the courts of this state have repeatedly refused to recognize as valid and binding. Not only have our courts refused to recognize such decrees as valid, but with reference to this particular decree an action had been brought in this state by Mrs. Olmsted for separate support and maintenance, and for the sequestration of the property of her husband for that purpose; and, although he appeared by counsel, the court has adjudged her entitled to such sequestration and support, and upon the ground that he had deserted her and her family. Thus we have an adjudication in our own courts, establishing the fact that Mrs. Olmsted was still his wife, notwithstanding the Michigan decree. It is, however, urged

that, although the Michigan decree may be invalid and of no force or effect, still the illegitimate children became legitimate under that decree, and therefore our courts are bound to recognize them as legitimate. We cannot approve of the soundness of such a contention. As we have already stated, the statute was designed only for such persons as were free from legal obstacles preventing their marriage, and it consequently follows that, if the divorce was void, then legal obstacles did exist to the marriage of these persons; for Olmsted had another wife living from whom he had no valid divorce, and his marriage under such circumstances was polygamous, and, had the ceremony been performed in this state, it would have been bigamous and punishable criminally. Should we sanction the doctrine contended for, then the Legislature in any state could, in effect, nullify our own statutes and deprive our own citizens of property, which under our laws they had become lawfully vested with and entitled to receive. Not only this, but the statute of Michigan, passed in 1881, could change the provisions of a will executed here and probated in 1874, bringing in persons as remaindermen who, under the provisions of the will, were not remaindermen, nor entitled to share in the estate. We think this should not be permitted.

The judgment of the Appellate Division should be reversed, and that of the trial court affirmed, with costs in both courts.

MOEN v. MOEN.

(Supreme Court of South Dakota, 1902. 16 S. D. 210, 92 N. W. 13.)

The plaintiff herein is the illegitimate child of John Johannessen Moen, otherwise known as John K. Moen, deceased. She was born in Norway, Europe, on or about the 24th day of September, 1874, where she resided until the year 1893, when she came to South Dakota, and has since lived in said state. Britta Iverson was plaintiff's mother, and was also born and at all times lived in Norway, where she now lives. Moen was born and lived in Norway, until the latter part of 1874, or the early part of 1875, when he came to the United States, and settled in the territory of Dakota. Before leaving Norway, but while a resident and citizen of said country, and after the birth of plaintiff, he acknowledged himself to be the father of the plaintiff, in writing signed and executed by him in the presence of a competent witness. Moen died in Lincoln county, South Dakota, in the month of May, 1877. In February, 1885, the government of the United States issued a grant or patent for a certain tract of land in Dakota to Moen's heirs. In March, 1887, Moen's father conveyed these premises by quitclaim deed to his son John J. Moen. There was no law in Norway, at the time of the birth of plaintiff, nor has there been since, either written or unwritten, by which the plaintiff herein could

inherit, under or by virtue of the instrument executed by Moen, nor did he at any time publicly acknowledge the plaintiff as his child, nor did he treat her as if she were legitimate, nor did he adopt her in any manner as his child.[31]

HANEY, P. J.[32] * * * The plaintiff contends that upon the facts so found the court below should have concluded that she was the absolute owner and entitled to the possession of the premises described in the complaint, instead of deciding that defendant was the owner and entitled to the possession. The land in controversy was conveyed by the United States to "the heirs of John K. Moen." It was located in the then territory of Dakota, now state of South Dakota. Who are intended as grantees in such a conveyance depends upon the law of the state or territory wherein the land is situated. Investment Co. v. Caldwell, 152 U. S. 65, 14 Sup. Ct. 504, 38 L. Ed. 356. It is an established principle, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. United States v. Fox, 94 U. S. 315, 24 L. Ed. 192; Comp. Laws, § 2733. Our Civil Code contains the following rules relating to succession or "the coming in of another to take the property of one who dies without disposing of it by will": "If the decedent leaves no surviving husband or wife, but leaves issue, the whole estate goes to such issue." "Every illegitimate child is an heir of the person, who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child." Comp. Laws, §§ 3399, 3401, 3403. The Civil Code now in force in this state had its origin in the report of a New York commission, which first took the form of a statute in an act passed at the fifth session of the legislative assembly of Dakota territory, approved January 12, 1866. The same report, revised and amended, was enacted as the Civil Code of California in 1873. In 1875 a commission was created to revise and codify the laws of Dakota territory. This commission revised the Civil Code then in force, incorporating therein many of the amendments made by the legislature of California. Its labors resulted in the Revised Codes of 1877, which took effect February 17, 1877. The provisions relating to succession, heretofore quoted, are found in the California Code, but not in the territorial Code previous to the revision of 1877. Thus it would appear that the law relied upon by the plaintiff came from California, and was in force in the jurisdiction wherein the land in controversy was situated when her father died, but was not in force therein when he, in writing, in the presence of a competent witness, acknowledged himself to be her father. Though the facts relating to such acknowledgment, as found by the court below, comply literally with

[31] This statement of facts has been abstracted from the opinion.
[32] A part of the opinion has been omitted.

the language of the statute, defendant contends that the plaintiff did not succeed to her father's estate, because: (1) Such acknowledgment was executed before the statute took effect; and (2) because it was executed in Norway, where there was and is no law by which she could inherit under such an instrument. The statute does not, by its express terms, support respondent's contention. It relates to the subject of succession; it is broad and comprehensive, and should be "liberally construed with a view to effect its objects and to promote justice." Comp. Laws, § 4763. Undoubtedly, the principal object of the legislature was to enable an illegitimate child to inherit its father's estate, and incidentally to prescribe the character of evidence required to establish its paternity. Recurring to the language of the statute, when is a child an heir? Manifestly, upon the death of its ancestor. An heir, as the term is here used, is always appointed by the law. Its title is called into existence by the death of its ancestor, and its rights are governed by the law in force at the time of such death. 2 Washb. Real Prop. pp. 6–17. No one can take real property except those who are recognized as heirs by the law of the country where the property is situated. Story, Confl. Laws, § 483. No one has any vested rights in his ancestor's property until the latter's death. He may not survive the ancestor. The ancestor may dispose of the property by will, or the law of succession may be changed before his title becomes vested. The acknowledgment required by the statute cannot be executed after the ancestor's death. Hence the thought of the lawmaker would have been more accurately expressed in these words: "Every illegitimate child shall inherit of the person who, at the time of his death, shall have acknowledged himself to be the father of such child, in writing, signed in the presence of a competent witness." The inquiry demanded by the statute to be answered at the time of the property owner's death is simply this: Has the paternity of the person claiming to be an heir been acknowledged by the deceased, in writing, signed in the presence of a competent witness? The time and place of such acknowledgment are not prescribed by the statute. It may have been made at any place and at any time after the birth of the claimant and before the death of the ancestor. The effect of the acknowledgment is to clothe the child with the same rights as to real property as are possessed by one born in lawful wedlock. This is clearly what the legislature intended, and it was within the legislative power to make such rules regarding succession to real property within its jurisdiction as it deemed expedient. There is, therefore, no merit in the contention that the acknowledgment in this case is ineffectual because it was executed before the statute took effect. A different conclusion was reached by the United States Circuit Court in Iowa. Hartinger v. Ferring (C. C.) 24 Fed. 15. We prefer, however, to follow the opinion of the Supreme Court of that state on this subject. In a recent case involving the right of an illegitimate child to inherit property in Iowa that court, speaking by Justice McClain, uses this

language: "Appellees insist that evidence of recognition must be strictly limited to acts and conversations subsequent to the time when such recognition would by law entitle the plaintiff, if an illegitimate son, to inherit. For this contention they cite the case of Hartinger v. Ferring (C. C.) 24 Fed. 15, in which the Circuit Court of the United States for the Northern District of Iowa reached the conclusion contended for; but we think this position is untenable. The Legislature, having the right to determine the rules of inheritance in accordance with which the property of persons subsequently dying shall be distributed, may provide as it sees fit with reference to who shall be heirs. There is no vested right to inherit until the death of the ancestor. It may, therefore, be provided that illegitimate children already born and recognized shall be considered heirs. The recognition contemplated by the statute is not recognition as prospective heir, but recognition as an illegitimate child; and whoever fulfills the conditions of the statute as to the right to inherit existing at the time of the death of the ancestor is entitled to inherit under the statute. There is nothing in the language indicating that it was to be applicable to such recognition as should afterwards be made. It describes a class of persons, and declares that persons of that description shall inherit. It does not refer to or create a status. It is prospective in its operation as to the right, but there is nothing to suggest that persons of the class described—that is, illegitimates already recognized—shall not inherit under it. It would be just as reasonable to limit the provisions of the statute to illegitimates afterwards begotten and born as to so limit it to illegitimates afterwards recognized, and it would be just as reasonable in the one case as in the other to argue that to adopt a construction making it applicable to existing illegitimate children would be to give the statute a retrospective effect." Alston v. Alston, 114 Iowa, 29, 86 N. W. 55. If the acts constituting the acknowledgment are in themselves such as the statute prescribes, they confer the right to inherit in the state where the real property is situated, without reference to the intent with which they were performed. In re Rohrer's Estate, 22 Wash. 151, 60 Pac. 122, 50 L. R. A. 350; Blythe v. Ayres, 96 Cal. 532, 31 Pac. 915, 19 L. R. A. 40; Brock v. State, 85 Ind. 397; Crane v. Crane, 31 Iowa, 296. It is, therefore, wholly immaterial what law existed in Norway relating to the recognition of illegitimate children when the writing in this case was signed by the plaintiff's father. It may be conceded that he neither knew nor intended that its execution would confer upon the child the right to inherit his property in any jurisdiction. Nevertheless, it had the effect of furnishing the proof required by the laws of this jurisdiction to establish the fact that he was the father of the child, and such fact being thus established makes her an heir of her deceased father, and entitled to the land in controversy. We do not apprehend that the decision in Eddie v. Eddie, 8 N. D. 376, 79 N. W. 856, 73 Am. St. Rep. 765, conflicts with this conclusion. In that case the father never

acknowledged the children to be his own by any written instrument. The court was dealing with the statute of North Dakota relating to the adoption of children, and may have been right in concluding that the status of the persons claiming to have been adopted by acts performed in Norway could not be determined by the law of North Dakota. Here we are dealing simply with a rule of succession as it was in force and affected title to real property in Dakota territory at the time of the owner's death. If, however, our views do conflict with the decision in North Dakota, we cannot, with all due respect to the able court of that state, arrive at any other conclusions than those announced herein. Upon the facts as found by the learned circuit court, we think the plaintiff should have been adjudged to be the owner in fee and entitled to the possession of the premises in controversy.

Not having appealed, the defendant is in no position to question the correctness of the findings of fact. The judgment of the circuit court is reversed, and the case remanded, with directions to enter a judgment decreeing the plaintiff to be the owner in fee of the premises described in the complaint, and entitled to the possession thereof, and for her costs and disbursements.[33]

[33] Accord: Hall v. Gabbert, 213 Ill. 208, 72 N. E. 806 (1904).

Similar principles govern adoption. See Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321 (1880); Van Matre v. Sankey, 148 Ill. 536, 36 N. E. 628, 23 L. R. A. 665, 39 Am. St. Rep. 196 (1893); and, in general, 39 Am. St. Rep. 229–231; 65 L. R. A. 186–187.

CONTINENTAL LAW.—The national law of the parties governs the question of legitimation and adoption. *Italy.*—Article 6, Prel. Disp. Civ. Code. *France.*—Legitimation by the intermarriage of the parents depends upon the national law of the father at the time of the marriage. App. Caen, Nov. 18, 1852 (S. 1852, 2, 432). On the ground of public policy, however, a child will be legitimated, irrespective of the national law of its parents, as a result of the intermarriage of its parents in France. Cass. Nov. 23, 1857 (S. 1858, 1, 293). *Germany.*—The national law of the father at the time of the legitimation or adoption applies. K. G. May 28, 1901 (13 Niemeyer, 417). If the parent or adopter belongs to a foreign country, the child being a German subject, the assent of the child or its guardian is necessary to the validity of the legitimation or adoption. Article 22, Law Intr. Civ. Code.

See, also, F. Despagnet, De la légitimation en droit international privé, 15 Clunet, 592–602; L. Duguit, Du conflit des lois en matière de filiation, 12 Clunet, 353–374; 13 Clunet, 513–526; J. Keidel, Le droit international privé dans le nouveau Code Civil Allemand, 26 Clunet, 249–254; Carl Ritter, Ehelichkeitserklärung und Adoption im deutschen internationalen Privatrecht, 14 Niemeyer, 435–470; E. Stocqart, De la légitimation des enfants naturels par mariage subséquent en droit international privé, envisagée spécialement au point de vue du droit anglais, 15 Clunet, 205–212.

The relationship between parent and child is governed by the national law of the parent, subject to the rules concerning public order. So as to legitimacy. *Germany*, article 18, Law Intr. Civ. Code; K. G. Feb. 2, 1901 (11 Niemeyer, 95). See, also, section 328, Code Civ. Proc. *Italy*, Genoa, Dec. 14, 1891 (Monitore 1892, p. 171). So as to proof of legitimacy. *France*, App. Rouen, July 25, 1906 (4 Darras, 247). So as to recognition of natural children and its effect. *France*, Cass. Jan. 17, 1899 (S. 1899, 1, 177), and note by A. Pillet. So as to relationship of an illegitimate child to its mother. *Germany*, article 20, Law Intr. Civ. Code. German law, however, will be applied if the mother has lost, but the child has retained, the German nationality. Article 20, Law Intr. Civ. Code.

SECTION 4.—MATRIMONIAL PROPERTY.

HARRALL v. WALLIS.

(Court of Chancery of New Jersey, 1883. 37 N. J. Eq. 458.)

Suit by Mrs. Claire Harrall, of Paris, against the executors, next of kin, and legatees of her late husband, Dr. Frederick F. Harrall, for the recovery of one-half of all his personal property. Harrall made a will in 1869, in New York, where he was then domiciled. He thereupon established his domicile in France, and was married there in 1877 to complainant, a French subject. Harrall died in a lunatic asylum in Pennsylvania in 1881.[34]

RUNYON, Ch.[35] [After stating the facts and finding that at the time of his marriage and at the time of his death Harrall was domiciled in France, the learned Chancellor continued as follows:]

By the law of France, where there is no contract between them on the subject, the parties to a marriage are, by what is called "le régime de la communauté," entitled in common (each to one-half), by a kind of partnership, to the personal property which belonged to either of them at the time of the marriage, or which they acquired afterwards by title of succession or by gift (unless otherwise provided by the donor) and the produce thereof, and all the real estate acquired by either during the continuance of the marriage relation, except such as is acquired by inheritance or gift. Code Civil, § 1401. If the husband, as in the case in hand, made a will before marriage disposing of his estate to others, it will only, as to the common property, be operative as to his share. "As a general rule," says Mr. Parsons, "the rights of the parties as springing from the relation of marriage, where there is no special nuptial contract, must be determined by the place where they then supposed themselves and intended to be domiciled." 2 Pars. on Cont. 111. "It is universally allowed," says Mr. Westlake, "that when a marriage takes place without settlement, the mutual rights of the husband and wife in each other's movable property, whether owned at the time of the marriage or afterwards acquired, are to be regulated by the law of the matimonial domicile, so long as that remains unchanged." Westlake, Priv. Int. Law, 352. Judge Story states it as a proposition, which, though not universally established or recognized in America, has much of domestic authority for its support and none in opposition to it, that "where there is no express contract the law of the matrimonial domicile will govern as to all the rights of the parties to their present property in that place,

[34] This brief statement of facts has been taken from the opinion.
[35] A part of the opinion has been omitted.

and as to all personal property everywhere, upon the principle that movables have no situs, or rather that they accompany the person everywhere, and that as to immovables the law rei sitæ will prevail." Story's Confl. L. § 186. That domicile, where there is no intention to remove to another state, is that of the husband at the time of the marriage. It is urged in this case, however, that Dr. Harrall could not have obtained a domicile in France at the time of his marriage, because, it is alleged, the French Code declares that a foreigner, to obtain a domicile in that country, must apply to the government for permission to do so, and obtain express authority from it to establish such domicil, and that Dr. Harrall made no such application. The provision in question is "L'étranger qui aura été admis par le gouvernment à établir son domicile en France y jouira de tous les droits civils tant qu'il continuera d'y résider." Code, art. 1, c. 1, § 13. But the object of that provision is to establish the mode in which a foreigner can become entitled to enjoy the civil rights of a Frenchman, and it does not affect the consideration of the question now before me. Although Dr. Harrall had not been admitted to the civil rights of a Frenchman, or, in other words had not, to use our form of speech on the subject, become naturalized in France, that fact did not prevent him from obtaining a domicile, in fact, there. And the rights of the complainant are to be determined, not by the decision of the question whether her husband assumed allegiance to the government of France, but by the decision of the question whether, when the marriage took place, he was domiciled, in fact, in that country. See Dicey on Domicile, 362. Several cases are cited in which the French courts have held that, in the absence of any express nuptial contract, the husband's mere domicile, in fact, determined the widow's rights in his personal estate. It is urged that there are decisions of those courts to the contrary also.

But it is a question not depending for its determination merely on the decision of the French courts. It is a question of international law upon which the adjudications of those courts are indeed of very high importance, but it is to be decided in this case here according to what may seem to be just views and principles. I conclude from the evidence that Dr. Harrall, at the time of his marriage, was in fact domiciled in France; that he intended to reside there permanently, and did not intend to return to America to reside, and that after that time he never changed his domicile. It follows that as the law of France would give the complainant one-half of the personal estate of her husband notwithstanding the will, this court shall therefore award it to her. Had Dr. Harrall been domiciled here, and died intestate, our law would have given to her one-half of his personal estate, for he had no children, and in this connection it will not be amiss to state, although the fact will not affect the decision, that in November, 1877, his attorney and agent in New York, who also was his friend and confidential adviser, wrote to him in regard to the condition of

his business affairs here, giving him advice as to what he should do to protect his property against his generous disposition and the temptation to lavish expenditure, and stated to him that perhaps he was not aware that his marriage had annulled the will which he made before leaving this country, but that such was the fact. This was about nine months after the marriage. This statement of the law as to the revocation of his will by marriage was erroneous, as a statement of the law of New York where the testator was domiciled when he left this country. By that statement he undoubtedly was assured that the disposition of his property in case of his death could not be controlled or affected by that will. He died in Pennsylvania. By the law of that state a testator's marriage is, as to his wife, a revocation of his existing will, and her rights in his property on his death are the same, so far as that will is concerned, as if he had died intestate. But Dr. Harrall was not domiciled in that state. Nor was he domiciled here. His domicile, if not in France, was in New York. In my judgment it was in the former. Though he did not die in this state, and was not domiciled here when he died, his personal property is here, and his will was proved here. This suit is therefore brought here. Had he remained in France up to his death, the complainant would have been entitled to one-half of his personal property She should, under the circumstances, be decreed to have the same right here. There will be a decree in her favor accordingly. She is entitled to costs, payable out of the estate.[36]

DE NICOLS v. CURLIER.

(House of Lords, 1899. [1900] App. Cas. 21, 69 L. J. Ch. 109.)

Earl of HALSBURY, L. C.[37] My Lords, it is not necessary to state with great minuteness how the question in the present appeal arises. It is enough to say that two French subjects were married according to the laws of France on May 30, 1854. No marriage contract or instrument in writing was executed by either of the parties. The parties lived together, and in the year 1863 they came to England, and in the year 1865 the husband obtained the status of a naturalized British subject.

The whole dispute turns on the question whether the changed domicile and naturalization of the husband affected the wife's rights so as to give the husband the power to dispose of all the movable property by will instead of being restricted to the power of disposing of only one half of it, as he undoubtedly would have been so restricted by French law if the French law is decisive of the question.

[36] This case was affirmed by the court of Errors and Appeals under the name of Harral v. Harral, 39 N. J. Eq. 279, 51 Am. Rep. 17 (1884).

[37] The concurring opinions of Lord Macnaghten, of Lord Shand, and of Lord Brampton have been omitted.

[The learned justice here commented upon the French law and continued as follows:]

If this is the law by which the matter is to be governed, it cannot be denied that the appellant here must succeed, and it is a little difficult to understand upon what principle contracts and obligations already existing inter se should be affected by an act of one of the contracting parties over which the other party to the contract has no control whatever. And, indeed, it is not denied that if, instead of the law creating these obligations upon the mere performance of the marriage, the parties had themselves by written instrument recited in terms the very contract the law makes for them, in that case the change of domicile could not have affected such written contract. I am wholly unable to understand why the mere putting into writing the very same contract which the law created between them without any writing at all should bar the husband from altering the contract relations between himself and his wife; when if the law creates that contract relation, then the husband is not barred from getting rid of the obligation which upon his marriage the law affixed to the transaction.

A written contract is after all only the evidence of what the parties have agreed to, and it would seem to be of no superior force as evidencing the agreement of the parties than a known consequence of entering into the married status. I not only do not understand, but I should decline to assent to any such view, unless I am compelled by authoritative decision or statute to adopt a view which to my mind is so entirely unreasonable. And it does not appear to me that any court before whom this question has come would disagree with me as to its being unreasonable.

The Master of the Rolls himself says: "It is not altogether satisfactory to hold that a change of domicile cannot affect an express contract embodying the law of the matrimonial domicile, but that a change of domicile does affect the application of that law if not embodied in an express contract."

My Lords, I should think that, in order to be binding on your Lordships, a previous decision must be in principle, and, as applicable to the same circumstances, identical; and it appears to me that the case by which the Master of the Rolls thought himself bound (Lashley v. Hog, 4 Paton, 581) is quite distinguishable both in principle and in circumstances.

To omit other questions, the cardinal distinction between the French and the Scottish law is not, I think, without an important bearing upon the very question in debate, and I think it may be stated shortly thus: If the wife by the marriage in Scotland acquired no proprietary rights whatever, but only what is called a hope of a certain distribution upon the husband's death, it is intelligible that that right of distribution, or by whatever name it is called, should be dependent upon the husband's domicile, as following the ordinary rule that the law of a person's domicile regulates the succession of his movable property. But if by the

marriage the wife acquires as part of that contract relation a real proprietary right, it would be quite unintelligible that the husband's act should dispose of what was not his; and herein, I think, is to be found the key to Lord Eldon's judgment. He says (4 Paton, 617): "The true point seems to be this, whether there is anything irrational in saying that as the husband, during the whole of his life has the absolute disposition over the property, that as to him, whom the policy of the law has given the direction of the family as to the place of its residence, that he who has therefore this species of command over his own actions, and over the actions and property which is his own, and which is to remain his own, or to become that of his family according to his will—why should it be thought an unreasonable thing, that, where there is no express contract, the implied contract shall be taken to be that the wife is to look to the law of the country where the husband dies for the right she is to enjoy in case the husband thinks proper to die intestate."

It will be observed that the whole point of what Lord Eldon argues is that the whole of the property, apart from express contract, is absolutely and entirely the husband's, and that as by law he can dispose of it as he will, it is not unreasonable that he should be at liberty to do something which by its legal effect will change what I think are inaccurately described as the rights of the wife, but are accurately described as what would have been the rights of the wife if no change had taken place, because in substance she has until the husband's death no rights at all.

Doubtless it is true that, according to the authorities on Scottish law, the right of the wife is no right at all in its strict sense. When speaking of the jus mariti it is described as a legal assignation to the husband, and, in commenting on this authority, the late Mr. Fraser, while at the Scottish Bar, in his book on the Law of Husband and Wife (2d Ed.) vol. 1, p. 677, says: "At a very early period of our law, the distinction between the two rights was recognized. The right of administration was regarded as being nothing more than its name imports—a right of administering the property of the spouses; while the jus mariti was something separate and superior, its purpose being to transfer the property from one spouse to the other. The distinction is settled and taken in a number of cases ranging from an early period to the present time, and has not been so clearly marked in some institutional works, solely from the desire of the writers to reconcile it with the notion of an absolute veritable communio. * * * The distinction is thus stated in argument in the Session Papers of Gowan v. Pursell: The jus mariti over the movables is a right during the existence of the marriage of absolute property. The husband may sell or squander, or wastefully destroy the movables that fall under communion." How different the position of the wife is under the French law is sufficiently indicated in contrast to the above extract, by section 1443 of Code Civil, which enacts that: "1443. A separation of prop-

erty can only be judicially sued for by the wife whose dowry is in danger, and when the disorder of the husband's affairs is such that there is reason to fear that his property will not be sufficient to satisfy the wife's rights and claims. Any voluntary separation is void." And if the propositions are put shortly—that the wife acquires no proprietary rights by marriage under the Scotch law at all, but under the French law acquires a real proprietary right, the distinction between the two systems is evident enough. The communio bonorum in Scotland is a mere fiction. In France it is a reality, and in England, as the Master of the Rolls says, the parties to the litigation now being discussed, Mr. and Mrs. Hog, were both English, married in England, where her unsettled property, existing and after-acquired, became the property of Mr. Hog by the mere fact of the marriage, and gave Mrs. Hog no proprietary right whatever to the movable property in question.

Once it is admitted that the marriage gives a proprietary right (and therein is the importance of the distinction Lord Eldon took between what was inaccurately argued in that case as a proprietary right conferred by the fact of marriage, and a real proprietary right conferred by specific contract), the anomaly pointed out by the Master of the Rolls and sought to be explained becomes at once intelligible. It is only material as illustrating what was the prevailing train of thought in the minds of Lord Eldon and Lord Rosslyn. Both of them speak of the words "implied contract," by which I presume they mean implied from the relation of husband and wife, and not unnaturally they deduce the conclusion that if it is implied from that relation only the husband's change of domicile may bring with it the consequential change from such relation.

Here, however, as I have endeavored to point out, the French marriage confers not only an implied but an actual binding partnership proprietary relation fixed by the law upon the persons of the spouses, the binding nature of which, it appears to me, no act of either of the parties contracting marriage can affect or qualify.

I can only account for the absolutely inaccurate use of the Scottish term "jus relictæ" as arising from a reference to a dispute that appears to have existed in the Scottish authors as to whether those rights flowed from the communion, whereas, to quote again from Mr. Fraser's book (page 671), where he says: "It has been found in accordance with the opinions of the French commentators, of Dirleton, and other lawyers of our own country, that the jus relictæ and legitim are in all respects the same, that they are mere casual contingent rights during the subsistence of the marriage, existing then only in hope, and coming into proper rights merely at its dissolution, that they are not rights of division of a fund already held in common, but rights of debt against the husband's executors, constituting the widow and the children creditors, whose right comes into being by the husband's

death, and secondary creditors too, for all other debts must be paid before theirs."

It is, therefore, as I understand, that when once Lord Eldon came to the conclusion that the husband and wife had become Scottish domiciled spouses, the property not affected by a previous complete and irrevocable right would properly be distributed according to Scottish law.

It follows, therefore, if I am right, that that case is not binding on your Lordships, and that we are at liberty to decide the question now in dispute in accordance with reason and common sense.

I therefore move your Lordships that the order appealed from be reversed, and that in respect of costs, as I understand this is only one question in the summons which comprehends other questions also in debate, the costs of this appeal should be costs in the summons.

In re DE NICOLS.

DE NICOLS v. CURLIER.

(Chancery, 1900. 2 Ch. Div. 410, 69 L. J. Ch. 680.)

KEKEWICH, J.[39] Undoubtedly the House of Lords considered and determined merely the question whether the marriage contract affected movable goods notwithstanding the change of domicile, and all that was said must be read with reference to that question, as the only one to which attention was directed. Albeit so restricted, the decision proceeded on the broad principle that a contract operating by force of law in the absence of expression by the parties is as complete and as obligatory as a contract expressed, and must have effect given to it on the same footing. Unless, therefore, there is some inherent disability in some particular property to be bound by such a contract, it must equally be applied to and enforced against all falling within its scope, and this is according to the language of the Code and the evidence given in explanation of it. On the present occasion the court is asked to determine whether in enforcing the contract it is right to include freehold and leasehold estates in England—that is, what we term real estate and chattels real, as distinguished from personal estate other than chattels real which is covered by the decision of the House of Lords. Assuming that these freehold and leasehold estates are within the scope of the contract, it is impossible to avoid the conclusion that they are affected by it, unless, to repeat what has been already said, there is a disability inherent in this species of property. There are, therefore, two questions for consideration—one of fact, namely, whether these estates are within the scope of the contract;

[39] The statement of facts has been omitted.

the other of law, whether they can be affected by it. The first question depends on the evidence which was before the House of Lords, some further evidence given by affidavit and orally on the hearing of the present application, and additional evidence adduced under leave given after the hearing in consequence of a letter from one of the witnesses which was communicated to the court. This evidence was directed to the proper meaning of "immeubles" in the French Code. There is no difficulty about the meaning of the word as regards the character of property comprised in it. It means, broadly, the soil itself and that which is attached to the soil as distinguished from that which, being unattached, is therefore movable. As in our own system of law so in that of France some things are, from their close connection with the land, treated as attached to it, and, therefore, immovable; but these exceptions do not impair the general description, and are of no importance here. The difficulty which arose was whether the term comprised immovables abroad—that is, beyond France. The words of the Code are, apparently, wide enough to cover all, wherever situate, and, if it could be treated as an English instrument which the court is competent to construe, it would be impossible to avoid the conclusion that this is its real meaning. But to arrive at a conclusion respecting the construction of the Code in this particular is beyond the competence of the court. It is a matter of fact with which the court can only deal according to the testimony of those qualified to give it. Hence the oral and the additional evidence subsequently given, to which reference has already been made. That evidence has set the matter at rest, and removed all difficulty. It may be stated in general terms that, unless an exception is established in a particular case on the ground of public policy (and there is no suggestion of that here), the provisions of the Code as regards "immeubles," are of universal application—that is, apply equally to immovable property situate in France and to that situate in a foreign country.

Turning now to the question whether there is any objection in law to the contract operating according to the intention of the parties so as to bind the freehold and leasehold estates, one is at once confronted by the principle which distinguishes obligations respecting real estate from those which affect personal estate. That principle is well established, and is to be found stated in different language in many books. It will suffice to cite one. In Story on the Conflict of Laws, § 158, the learned author says this:

"The result of this reasoning (and it certainly has very great force) would seem to be, that in the case of a marriage without any express nuptial contract, the lex loci contractus (assuming that it furnishes any just basis to imply a tacit contract) will govern as to all movable property, and as to all immovable property within that country, and as to property in other countries, it will govern movables, but not immovables, the former having no situs, and the latter being governed by the lex rei sitæ."

In the following section (159) he expounds this subject in a manner so apposite to the case in hand that it is worth while to quote it at length. It runs thus:

"Perhaps the most simple and satisfactory exposition of the subject, or, at least, that which best harmonizes with the analogies of the common law, is, that in the case of a marriage where there is no special nuptial contract, and there has been no change of domicile, the law of the place of celebration of the marriage ought to govern the rights of the parties in respect to all personal or movable property, wherever that is acquired, and wherever it may be situate; but real or immovable property ought to be left to be adjudged by the lex rei sitæ, as not within the reach of any extraterritorial law. Where there is any special nuptial contract between the parties, that will furnish a rule for the case, and, as a matter of contract, ought to be carried into effect everywhere, under the general limitations and exceptions belonging to all other classes of contracts."

According to the decision of the House of Lords, there is here a special nuptial contract between the parties ascertained by reference to the Code, but not less precisely ascertained because it was not reduced into writing in connection with the particular marriage. It ought, therefore (to adopt the language just quoted), to be carried into effect everywhere, but under the limitations and exceptions belonging to all other classes of contracts, one of which is, that as regards immovables, the lex rei sitæ must prevail. There is nothing in the common law of England to make the contract, which we have already seen to be definite, unenforceable respecting the freeholds and leaseholds in question, and if there be any obstacle, it must be found in some statutory provision. There is none but the statute of frauds, but that does raise a formidable objection. Reference was made in argument to both the fourth and seventh sections of the statute. I do not propose to consider which of them is the more applicable, because, without doubt, either one or the other prohibits the creation of equitable interests in land, such as sought to be established here, except by writing under the hand of the creator of the trust. Nevertheless, it is insisted that the statute has no application to the circumstances of this case, and that the agreement between the parties made in consideration of marriage is sufficiently obligatory notwithstanding the absence of any writing. That is the point I am called upon to determine. It is settled that there may be an agreement of partnership by parol, notwithstanding that the partnership is intended to deal with land, and that to an action to enforce such agreement the plea of the statute of frauds will not avail. In such an action, therefore, the rights of the parties to the land, their respective interests in it, and their mutual obligations respecting it, may and must be determined and enforced notwithstanding there has been no compliance with the statutory provision. The authorities for this are not numerous, but they are conclusive—namely, Forster v. Hale, 3 Ves. 696, 5 Ves. 308, 4 R.

R. 128, and Dale v. Hamilton, 5 Hare, 369. In the latter case Wigram, V. C., applied this ruling to a case where the partnership was intended to deal exclusively with land. Lord Lindley in his work on Partnership (6th Ed.) p. 89, says that the latter case goes a long way towards repealing the statute of frauds, and that it is difficult to reconcile it with sound principle or the more recent decision of Caddick v. Skidmore, (1857) 2 De G. & J. 52. This is a strong adverse comment, but yet I am bound to treat the decision as sound, and I did so in Gray v. Smith, 43 Ch. D. 208. Whether it is competent for the Court of Appeal now to disturb the ruling above quoted or whether being competent the court would be willing to do so, is not for me to say; but at any rate, I must take the ruling to be established. It by no means follows that I ought to extend it, and it is fairly open to question whether the rule obtaining in contracts of partnership is properly applicable to a contract of marriage. In one sense, no doubt, that is also a contract of partnership; but no one would, I think, venture to rely on this, the ruling in the two cases referred to having reference to commercial partnerships with which the Court was there exclusively concerned. Nevertheless, the reasoning of the Lord Chancellor in Forster v. Hale, 3 Ves. 696, 5 Ves. 308, 4 R. R. 128, seems to me to show that he intended to lay down a general rule, which may be applied without extension to the case in hand. This, I think, was the view of Wigram, V. C., in Dale v. Hamilton, 5 Hare, 369, and also, as it seems to me, of Lord Lindley, who cites the passage from the Lord Chancellor's judgment in Forster v. Hale, 3 Ves. 696, 5 Ves. 308, 4 R. R. 128, which supports it. The Lord Chancellor held that the question whether there was a partnership or not must be tried as a fact, and if it were established by evidence that there was a partnership, then the premises necessary for the purposes of that partnership would by operation of law be held for the purposes of that partnership. It is established here by evidence that land acquired by either of the two parties to the contract would by force of the contract be held by him or her on certain terms described briefly by the phrase, "community of goods." Any lands subsequently acquired are an acquisition brought within, and are required to fulfill the purposes of the contract, and according to the Lord Chancellor's reasoning they are by operation of law held for those purposes. There may be error in this way of stating the case and applying the Lord Chancellor's ruling, but I am unable to discover it, and must, therefore, hold that the freehold and leasehold estates are as much subject to the community of goods as the movables which have been held subject to it by the decision of the House of Lords.

SAUL v. HIS CREDITORS.

(Supreme Court of Louisiana, 1827. 5 Martin [N. S.] 569, 16 Am. Dec. 212.)

PORTER, J.[40] The tableau of distribution filed by the syndics of the insolvent, was opposed in the court of the first instance; and the opposition being sustained, an appeal has been taken to this court, by the syndics, by the Bank of the United States, the Bank of Orleans, and the Bank of Louisiana.

The claims admitted by the judge a quo, and which are now contested here, are:

First, that of the children of the insolvent who claim as privileged creditors, for the amount inherited by them from their deceased mother. * * *

From the facts admitted by the parties, which admission makes the statement on this appeal, it appears: That Saul and his wife intermarried in the state of Virginia, on the 6th of February, 1794, their domicile being then in that state; that they remained there until the year 1804, when they removed to the now state of Louisiana; that they fixed their residence here, and continued this residence up to the year 1819, when the wife died; that after their removal from Virginia, and while living and having their domicile in this state, a large quantity of property was acquired, which at the death of the wife remained in the possession of her husband, the insolvent.

The children claim the one-half of the property, as acquests and gains, made by their father and mother in this state. The appellants contend, that as the marriage took place in the state of Virginia, by whose laws no community of acquests and gains was permitted, the whole of the property acquired here belonged to the husband.

This statement of the matter at issue shows, that the only question presented for our decision is one of law; but it is one which grows out of the conflict of laws of different states. Our former experience had taught us, that questions of this kind are the most embarrassing and difficult of decision, that can occupy the attention of those who preside in courts of justice. The argument of this case has shown us, that the vast mass of learning which the research of counsel has furnished, leaves the subject as much enveloped in obscurity and doubt, as it would have appeared to our own understandings, had we been called on to decide, without the knowledge of what others had thought and written upon it.

[The learned justice here examined the Spanish law and concluded that the law of the Partidas was limited to the gains made in the country where the marriage was contracted, and excluded from its operation property acquired after a change of residence. After referring to the opinions entertained with respect to the question in

[40] Portions of the opinion have been omitted.

hand by French and Dutch jurists, the learned justice continued as follows:]

An examination of the different treatises on this subject has convinced us, that the greater number of the lawyers of those countries, are of opinion, that in settling the rights of husband and wife, on the dissolution of the marriage, to the property acquired, the law of the place where it was contracted, and not that where it was dissolved, must be the guide. Such was the jurisprudence of the Parliament of Paris. It was the opinion of Dumoulin, of Boullenois, of Rodenburgh, of Le Brun, of Froland, of Bouhier, of Stockmans, of Pothier, and it is that of Merlin. On the other side are found D'Argentre, Cravette, Everard, Vandermeulen, the Parliament of Rouen, the Supreme Court of Brabant, and that of Metz.

But it is evident, the opinions of the greater number of those who think that on the dissolution of the marriage, the law of the place where it was contracted should regulate the rights of the spouses to the property possessed by them, is founded on an idea which first originated with Dumoulin, that where the parties marry without an express contract, they must be presumed to contract in relation to the law of the country where the marriage took place, and that this tacit contract follows them wherever they go.

It is particularly worthy of remark, that Dumoulin, the founder of this system, was of opinion, that the statute regulating the community was real, and that it was to escape from the consequences of this opinion he supposed a tacit contract, which, like an express one, followed the parties wherever they went. Such, at least, was the opinion which Boullenois entertained of Dumoulin's sentiments; and it appears supported by quotations which he makes from his works. Boullenois, Traite de personalite et de realite des lois, Obs. 29, p. 740, 757, 758.

Some of those who have adopted the conclusions of Dumoulin in regard to the marriage contract, treat the idea of a tacit agreement as one which exists in the imagination alone. But the greater number seem to have embraced it; and we are satisfied it is the main ground on which the doctrine now rests in France. So far, therefore, as great names can give weight to any opinion, it comes to us in a most imposing shape, but to our judgment it is quite unsatisfactory.

Admitting it for a moment to be true, that when parties married there was a tacit contract between them, their rights to property subsequently acquired, should be governed by the laws of the country where the marriage took place; that tacit agreement would still be controlled by the positive laws of any country into which they might remove. This is admitted by Dumoulin himself, who, after treating of the tacit agreement, and stating that the statute is not legal but conventional—"Statutarium proprie non est nec legale, sed conventitium"—adds, such tacit convention cannot have this effect in another place, where there exists a contrary statute, which is absolute and prohibitive, alias si statutum esset absolutum et prohibitorium, non ob-

stantibus pactis factis in contrarium: tunc non haberet locum ultra fines sui terriorii. Dumoulin on the first book of the Code, vebo conc. de stat. et consuet. loc. Froland, Memoires sur les statuts, chap. 4, 63.

If such be the consequence where the statute is prohibitive, we do not see why the same result should not follow from a real statute, which regulates things within the limits of the country where it is in force. The reason for both is the same, namely, that the laws of the country where the contract is sought to be enforced, are opposed to it. Why the one should have effect, and the other should not, we profess to be unable to distinguish. It may be a question whether the statute is real or not, but the moment it is admitted to be so, it regulates all property acquired within its authority; then, according to the principles of Dumoulin, the tacit agreement can no more control it, than it could the law which positively forbade such tacit agreement from having effect. So that even admitting this tacit agreement, we are brought back to the point from which we started; that is, whether the law regulating the right of husband and wife be real or personal.

But without agreeing with those, who have treated the idea of Dumoulin as one purely of the imagination, we think that he gives to this tacit consent a much more extended effect than it is entitled to; that in supposing, when parties marry, they intend the laws of the place where the contract is made should govern them wherever they go, he begs the question; and that the first thing to be settled is, whether these laws do govern them wherever they go.

We are now treating, let it be remembered, of a case such as that before us, where there is no express contract, and the argument is, that the parties not having entered into an express agreement, the presumption must be, they intended their rights to property should be governed by the laws of the country where they married. This is admitted. But then this presumption, as to their agreement, cannot be extended so as to give a greater effect to those laws than they really had. If it be true those laws had no effect beyond the limits of the state where they were passed, then it cannot be true to suppose the parties intended they should have effect beyond them. The extent of the tacit agreement depends on the extent of the law. If it had no force beyond the jurisdiction of the power by which it was enacted; if it was real, and not personal, the tacit consent of the parties cannot turn it into a personal statute. They have not said so; and they are presumed to have contracted in relation to the law, such as it was, to have known its limitation, as well as its nature, and to have had the one as much in view as the other. If the law of Virginia should have been, that for twenty years, the acquisitions made by the parties belonged to one of them, and they married without an express stipulation to the contrary, they would be presumed to have contracted in reference to this limitation of time. If, on the contrary, the law is limited as to place, the tacit agreement which is founded on a supposed consent that the law should govern them, must be considered to have

that limitation in view. In one word, the parties are presumed to have agreed, that the law should bind them as far as that law extended, but no further. So that this doctrine brings us back again to the inquiry, was the statute real or personal? Did it extend beyond the limits of the country where the marriage took place, or did it not? Whichever it may be found to be, the parties must be supposed to have contracted. In the absence of any thing expressed to the contrary, we cannot presume they intended to enlarge or restrain the operation of the law.

The most familiar way of treating this idea, of tacit contracts, being made in relation to the laws of the country where they are entered into, is to say, that the agreement is to be construed the same way, as if those laws were inserted in the contract. Now, supposing the parties to marry in Louisiana, and that our statute, providing for the community of acquests and gains, is real and not personal; that it divides the property, acquired while in this state, equally between the husband and wife, but does not regulate that which they gain in another country to which they remove: the insertion of this law in a contract would be nothing more than a declaration, that while residing within this state, there should be a community of acquests and gains. An agreement, such as this, could not have the same force as an express one, by which the parties declared, there should be a community of acquests and gains, wherever they went; for the one has no limitation as to place, and the other has. The maxim, therefore, which was so much pressed on us in argument, "Taciti et expressi eadem vis," is only true where the law, to which the tacit agreement refers, contains the same provisions as the written contract.

It was evidently on this distinction the cases of Murphy v. Murphy, 5 Mart. (O. S.) 83, 12 Am. Dec. 475, and Gales v. Davis' Heirs, 4 Mart. (O. S.) 645, were differently decided in this court. In the former, there was an express contract, that there should be a community of acquests and gains between the parties, even though they should reside in countries where different laws might prevail. In the latter there was no express agreement; and the parties were not presumed to have made a tacit one, contrary to the law of the place where they married. They were not supposed to have agreed, that a real statute, which governed them only while there, was to follow them as a personal one, and regulate their property in another state. If principles so plain, required any authority, we would find it in the very author, on whom the appellants principally rely. Dumoulin, after stating that the tacit contract will be controlled by a law that is contrary to it, in the country where the marriage is dissolved, adds: "That it will be different, where the agreement is express. Nisi expresse de tali lucro conventium fuisset, quia pactio bene extenditur ubique, sed non statutum mere." Froland, Memoires sur les statuts, cap. 4, p. 63.

Having thus stated the reasons why this doctrine of a tacit contract, cannot be admitted by us to the extent pressed by the counsel, it only

remains for us to examine, whether the law of the Fuero was a real, or personal statute. We consider it real. It appears to us to relate to things, more than to persons; to have, in the language of D'Agues-seau, the destination of property to certain persons, and its preserva-tion in families in view. It gives to the wife and her heirs, the one-half of that which would otherwise belong to the husband. Boul-lenois, who rejects Dumoulin's idea of a tacit agreement, says the statute which regulates the community is a personal one, because it fixes the state and condition of the spouses; and he goes so far as to declare, that if his adversaries will not allow this doctrine to be cor-rect, then the statute is real, for on no other ground can it be consider-ed personal. We think the state and condition of both husband and wife are fixed by the marriage, in relation to every thing but property, independent of this law; and as it regulates property alone, it is not a personal statute. Boullenois, Traité des statuts, cap. 5, obs. 29, p. 751; cap. 2, obs. 5, 80.

Upon reason, therefore, but still more clearly on authority, we think the appellants have failed to make out their case. We know of no question better settled in Spanish jurisprudence, and what is settled there, cannot be considered as unsettled here. The jurisprudence of Spain came to us with her laws. We have no more power to reject the one than the other. The people of Louisiana have the same right to have their cases decided by that jurisprudence, as the subjects of Spain have, except so far as the genius of our government, or our positive legislation, has changed it. How the question would be de-cided in that country, if an attempt were made there on the authority of French and Dutch courts, and lawyers, to make them abandon a road in which they have been travelling for nearly three hundred years, we need not say. The question is sufficiently answered by the auto already cited; in which the adoption of the opinions of foreign jurists, in opposition to those of Spain, is reprobated and forbidden.

We conclude, therefore, that a community of acquests and gains did exist between the insolvent and the mother of the appellees, from the time of their removal into this state; and that the court below committed no error, in placing them on the bilan as privileged credi-tors, for the amount of those acquests which remained in their father's possession, at the dissolution of the marriage. * * *

BROOKMAN v. DURKEE.

(Supreme Court of Washington, 1907. 46 Wash. 578, 90 Pac. 914, 12 L. R. A. [N. S.] 921.)

FULLERTON, J. In 1849 Eugene R. Durkee, then domiciled and having his residence in the state of New York, intermarried with one Cynthia H. Durkee, and thereafter lived with her as his wife in that state until 1889. In the year last named Mrs. Durkee died intestate,

leaving as her sole heirs at law the respondents in this action. During the time the marriage existed Eugene R. Durkee conducted a manufacturing business in the state of New York, and accumulated as the profits of such business a considerable fortune. In 1888, a year prior to the death of his wife, he used a portion of the fortune so accumulated in the purchase of certain real property situated in Pierce county, in this state, and in 1902 died in the state of New York, leaving a will by which he devised the property to the appellants. Neither the husband nor wife ever resided or had a domicile in this state. The respondents claim that the real property mentioned was the community property of Eugene and Cynthia Durkee, and that they have an undivided half interest therein as heirs of their mother. The appellants claim that the property was the separate property of Eugene R. Durkee, and that they are the owners of the whole thereof by virtue of the will. At the trial it was conceded that the rules of the common law governed the ownership of personal property acquired by a husband in the course of trade or business in the state of New York, and that money and other personal property accumulated by him in that state became his sole and separate property, subject to his absoltue dominion, and that the wife had no interest therein which would descend to her heirs on her death during the lifetime of her husband. The court held, nevertheless, that the real property purchased in this state during the lifetime of the wife with the funds so accumulated became the community property of the husband and wife, and that the wife's heirs inherited an undivided one-half interest in the property on her death. The correctness of this holding presents the sole question to be determined on this appeal.

The statutes of this state defining separate and community property read as follows (quotations from Ballinger's Ann. Codes & St.):

"Sec. 4488. Property and pecuniary rights owned by the husband before marriage, and that acquired by him afterwards by gift, bequest, devise or descent, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of his wife, and he may manage, lease, sell, convey, incumber, or devise, by will, such property without the wife joining in such management, alienation, or incumbrance, as fully and to the same effect as though he were unmarried. [Pierce's Code, § 3875.]

"Sec. 4489. The property and pecuniary rights of every married woman at the time of her marriage, or afterwards acquired by gift, devise, or inheritance, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, incumber or devise by will such property, to the same extent and in the same manner that her husband can, property belonging to him. [Pierce's Code, § 3867.]

"Sec. 4490. Property not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property. The husband shall

have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof." [Pierce's Code, § 3876.]

These statutes, the respondents assert, make no distinction between property acquired within this state and property acquired in another state and brought into this state, but that under these statutes all property acquired after marriage by either husband or wife, not acquired by gift, devise, or inheritance, or from the rents, issues, or profits of property so acquired, whether the same be acquired wholly within this state or in some other state and brought into this state is community property. But while the statute broadly construed, gives countenance to the contention of the respondents, we cannot think it was the intention of the Legislature that no distinction should be made between property acquired wholly within this state by the joint efforts of husband and wife and property acquired by them elsewhere and brought within this state. If it were the intent of the statute that property acquired in another jurisdiction and brought within the state should become community property, its legality might be seriously questioned. It would destroy vested rights. It would take from one of the spouses property over which he or she had sole and absolute dominion and ownership, and vest an interest therein in the other; and, if the spouse should be the wife, it would not only take away her absolute title, but would take away from her her right to control and manage the property, and make it subject to the separate debts of the husband, whether or not she derived any benefit from their contracting, or had any legal or moral obligation to pay them. Therefore, without entering further into the reasons for the rule, we are clear that personal property acquired by either husband or wife in a foreign jurisdiction, which is by law of the place where acquired the separate property of one or the other of the spouses, continues to be the separate property of that spouse when brought within this state; and, it being the separate property of that spouse owning and bringing it here, property in this state, whether real or personal, received in exchange for it, or purchased by it, if it be money, is also the separate property of such spouse.

While this question has not been directly before this court, analogous cases sustaining the rule can be found. In Freeburger v. Gazzam, 5 Wash. 772, 32 Pac. 732, certain personal property had been seized on an execution against the husband for which the community was liable. The wife sought to recover the property seized on the ground that it was her separate property, having been acquired by her by purchase with money which she acquired in the state of Kansas and brought into this state. The court held the property to be her separate property, saying that the property was her separate property in the state of Kansas, and did not change its status by being brought across our state border. In Elliott v. Hawley, 34 Wash. 585, 76 Pac. 93, 101 Am. St. Rep. 1016,

it was held that real property purchased in this state by a married woman living with her husband with money earned by her in Alaska was her separate property, since the money itself was by the laws of that territory her separate property, and its status in that respect was not changed by being brought into this state. This case is precisely in point, and would be controlling, were it not for the fact that the decision of the question was not necessary to a decision of the case, as the result must have been the same, had the property been determined to be community property. But the case, taken with the case first cited, shows that it has been the uniform opinion of this court since its organization that property acquired in the manner the property in question here was acquired is separate property. See, also, Dormitzer v. German, etc., 23 Wash. 132, 62 Pac. 862. The rule that property acquired in a foreign jurisdiction, which is there the separate property of one of the spouses, maintains its separate character when brought into a state having community property laws, prevails also in California, Texas, and Louisiana. Kraemer v. Kraemer, 52 Cal. 302; Estate of Burrows, 136 Cal. 113, 68 Pac. 488; Oliver v. Robertson, 41 Tex. 422; Blethen v. Bonner, 30 Tex. Civ. App. 585, 71 S. W. 290; Thayer v. Clarke (Tex. Civ. App.) 77 S. W. 1050; Tanner v. Robert, 5 Mart. (N. S.) 255; Young v. Templeton, 4 La. Ann. 254, 50 Am. Dec. 563.

We conclude, therefore, that the property in question was the separate property of Eugene R. Durkee, and passed to the appellants on his death by virtue of the terms of his will.

The judgment is reversed, and the cause remanded, with instructions to enter a judgment in accordance with this conclusion.[41]

GRAHAM v. FIRST NATIONAL BANK.

(Court of Appeals of New York, 1881. 84 N. Y. 393, 38 Am. Rep. 528.)

See ante, p. 345, for a report of the case.

[41] The existence of a lien or mortgage on the husband's property for the repayment of the money brought by the wife into the marriage community is determined by the law of the domicile of the parties at the time of the marriage. In re Myer (N. M.) 89 Pac. 246 (1907). See, also, Bonati v. Welsch, 24 N. Y. 157 (1861).

Whether or not a debt is to be regarded as a separate debt or as a community debt, and thus chargeable to the community land under the lex rei sitæ, depends upon the law of the place of contracting and domicile. La Selle v. Woolery, 11 Wash. 337, 39 Pac. 663, 32 L. R. A. 73 (1895); Id., 14 Wash. 70, 44 Pac. 115, 53 Am. St. Rep. 855 (1896); Clark v. Eltinge, 29 Wash. 215, 69 Pac. 736 (1902).

SMITH v. McATEE.

(Court of Appeals of Maryland, 1867. 27 Md. 420, 92 Am. Dec. 641.)

CRAIN, J.[42] The attachment in this case was issued by the appellee to affect the proceeds of sale of the real estate of the wife, to pay the debt of the husband. The facts as presented in the record are, that Nicholas Leister and wife were citizens of this state until August, 1854, when they removed to Illinois, where they resided when this attachment issued. Before removing from the state Leister became indebted to the appellee, who has always resided in Washington county, Maryland. The fund in controversy was derived from the sale of the real estate of Mary Gehr, the mother of Sarah Leister, the wife of Nicholas.

Mary Gehr died in 1855, leaving real estate in Washington county, and by her last will and testament devised a child's share of said estate to Sarah, the wife of Nicholas. In January, 1856, a bill was filed in the circuit court for Washington county against Leister and wife and the other devisees, for the sale of the real estate for partition. The bill was answered by Leister and wife. In their answer Sarah, the wife of Nicholas, claimed her portion of the estate as her sole and separate estate, free from the debts of her husband, and insisted that the same should not be divested from her by a sale thereof. Nicholas, the husband, disclaimed all right, title or interest at law or in equity to any portion of the estate of Mary Gehr, by virtue of his marriage with the said Sarah or otherwise. A decree was passed in the cause on the 12th of August, 1856, for the sale of the property, and in the decree it was provided that the proportion of the proceeds of the sale of the property, allotted to Sarah, should be deemed her separate estate, for her sole and separate use and benefit, free from any claim or control of her husband or his creditors. After the sale of the property the amount of the proceeds due Sarah was credited to her sole and separate use, and paid over to the appellant as her attorney, when it was attached by the appellee to pay the debt of her husband.

At the trial of the cause two bills of exception were taken by the appellant; the first to the admissibility of evidence, and the second upon the granting of the plaintiff's and the rejection of the defendant's prayers. To arrive at a proper solution of the questions to be determined by this appeal, we must ascertain the rights of Sarah, the wife, under the will of her mother and the proceedings and decree of the court, and whether the proceeds of the estate audited to her and received by Mr. Smith, as her attorney, were liable to be attached in our courts for the payment of the husband's debt. In 1841 the Legislature, recognizing the just and equitable right of the wife to the

[42] The statement of facts has been omitted.

enjoyment of her real estate, passed a law to protect the real estate of the wife from the debts of the husband. This legislation in favor of the wife against the creditors of the husband so favorably impressed itself upon the public mind, that by the thirty-eighth section of the third article of the Constitution of 1851 the Legislature was required to pass laws necessary to protect the property of the wife from the debts of the husband during her life, and for securing the same to her issue after her death. The Legislature, acknowledging the wisdom of this provision, in obedience to the mandate of the Constitution enacted Laws 1853, p. 323, c. 245. That act provides that all the property of the wife acquired or received, after her marriage, by purchase, gift, grant, devise, bequest, or in a course of distribution, shall be protected from the debts of the husband, and not in any way be liable for the payment thereof. And to effect the objects of the law, the wife was given the benefit of all such remedies for her relief and security as then existed or should be devised in the Courts of law or equity, without the necessity of the interposition of a trustee. The object contemplated by this law is too clear for doubt; by its enactment the Legislature intended to give full protection and security to the property of the wife against the creditors of the husband, as previous to its enactment the cases of Peacock v. Pembroke and Clarke, 4 Md. 280, and Turton's Ex'rs v. Turton, 6 Md. 375, had been decided by this court, and in each case the property was adjudged to be the husband's and subject to the payment of his debts. This act, soon after its passage, received a judicial interpretation in the case of Unger and Wife v. Price, 9 Md. 552. In that case, Mrs. Unger had sold her potential right of dower, and invested the money in personal property, and it was held by this Court to be exempted from the debts of the husband. The case of Mrs. Leister is equally strong, and comes within the principle settled in Unger and Wife v. Price. She was the devisee of real estate, and with the consent of her husband the proceeds of sale of the property under the decree of a court of equity were held to her sole and separate use, so audited to her and paid over to the appellant. But the appellee insists, that the proceedings and decree were not admissible evidence against him, because they were res inter alios acta. We admit, as a general rule, that judgments and decrees are evidence binding only between parties and privies. But there are many exceptions to this rule, and we are of opinion that this case forms one of the exceptions and comes within the principle settled by this Court in the case of Key v. Dent, 14 Md. 98. The record was introduced in this case to show how the fund was derived, and that the conversion from realty into personalty was not to prejudice the rights of the wife. For that purpose, according to the decision in Key v. Dent and the authorities relied on by Justice Eccleston, who delivered the opinion of the Court, the record was evidence. Head's Rep's v. McDonald, 7 T. B. Mon. (Ky.) 207; 4 Phillips on Evidence (Ed. 1843) 920, 921, 977. The record

was confirmatory of the answers of the garnishee and proof that the decree was had as there set forth. It was a decree of a Court of competent jurisdiction, which in the exercise of its powers as a court of chancery settled the property to the sole and separate use of Mrs. Leister. And although we find this right of the wife to her property, protected in this state by public policy, by statute and by a decree of a court of equity, yet it was earnestly contended by the learned counsel for the appellee, that a creditor of the husband had a right to attach this fund in our courts of justice for the debt of the husband, as by the laws of Illinois, where the husband and wife resided, the husband was entitled to all the personal property of the wife, and that by virtue of this law of the domicil the fund was vested in the husband. And he claimed this right to divest the wife of her property by the law of the domicile, on the ground of comity. In this case we cannot sanction such a right, for it has been decided that comity is overruled by positive law, and that it is only in the silence of any particular rule, affirming, denying or restraining the operation of foreign laws, that courts of justice presume a tacit adoption of them by their own government. Gardner v. Lewis, 7 Gill, 395. It is certainly competent for any state to adopt laws to protect its own property as well as to regulate it, and "no state will suffer the laws of another to interfere with her own, and in the conflict of laws, when it must often be a matter of doubt, which shall prevail, the court which decides will prefer the laws of its own country to that of the stranger." Story's Conflict of Laws, § 28. The courts of our state have perfect jurisdiction over all personal property as well as real within its limits belonging to the wife, and they have a right to protect both from the debts of the husband. If therefore our legislative enactment in regard to the property of the wife and the laws of Illinois conflict, it cannot be made a question in our own courts which shall prevail. "Where there is no constitutional barrier, we are bound to observe and enforce the statutory provisions of our own state." Davis v. Jacquin, 5 Har. & J. 109; Gardner v. Lewis, 7 Gill, 395.

As this fund by our laws is held by the appellant for the sole and separate use of Mrs. Leister, a creditor of the husband seeking a remedy against him in our courts must be governed and regulated by our laws; for Justice Story says "a person suing in this country must take the law as he finds it, and wherever a remedy is sought, it must be administered according to the lex fori; and such a judgment is to be given, as the law of the state where the suit is brought, authorizes." Story's Conflict of Laws, §§ 571, 572. And in this court in the case of Wilson & Co. v. Carson & Co., 12 Md. 75, Le Grand, Chief Justice, says: "The recognition of the laws of another state, in the administration of justice in this, is not a right stricti juris. It depends entirely on comity, and in extending it, courts are always careful to see that the statutes of their own state are not infringed to the injury of their own citizens."

We think these authorities decisive of the question, and that the appellant has a right to rely in a court of law upon the title of Mrs. Leister to the fund in controversy. Her right had not been divested by her own act or by operation of law, and the fund in his hands was not liable to be attached by the creditor of the husband.

The views which we have expressed of the legal propositions governing this case are conclusive upon the right of the plaintiff to recover, and it is unnecessary to examine the first bill of exceptions, to ascertain whether the evidence offered by the defendant of the laws of Illinois touching the rights of husband and wife were admissible or not. It follows from what we have said, that the instructions given by the court at the instance of the plaintiff and contained in the second bill of exceptions were erroneous. The prayers asked by the defendant's counsel embrace in our opinion the true theory of the law of the case and ought to have been granted. For these reasons we reverse the judgment of the circuit court.

Judgment reversed without procedendo.[43]

LONG v. HESS.

(Supreme Court of Illinois, 1895. 154 Ill. 482, 40 N. E. 335, 27 L. R. A. 791. 45 Am. St. Rep. 143.)

This was a bill in chancery brought by William Long and Catherine Gleim against George Hess, Louis Hess, Henry Hess, and Mary Kopf, the children, Christina Hess, the widow, and Louis Hess, the executor, of Jacob Hess, deceased, to set aside the will of Jacob Hess, and to declare a trust in favor of the complainants in two-sixths of the estate of the testator. Jacob Hess died March 29, 1891, in La Salle county, where he had lived for many years; leaving an estate consisting almost exclusively of lands situate in that county, and leaving a last will by which he gave his entire estate to his widow for life, and, after providing for the payment of $100 each to the complainants, divided the remainder among his four children above named.

Jacob Hess and Christina, his wife, were both natives of the grand duchy of Hesse, now a part of the German empire. Prior to their marriage, in 1846, Christina Hess was the widow of Bernhardt Lang, then lately deceased, and the complainants are her children by her former marriage.[44]

[43] The capacity of a wife to release a cause of action for personal injuries without the consent of her husband has been held to be governed by the lex loci delicti, and not by the lex domicilii, of the parties. Snashall v. Metropolitan R. Co., 19 D. C. (8 Mackey) 399, 10 L. R. A. 746 (1890).

See, in general, 57 L. R. A. 353–374; 85 Am. St. Rep. 552–578. As to what are vested property rights, see 84 Am. St. Rep. 437–450; 57 L. R. A. 363–366.

[44] Only so much of the statement of facts is given as is necessary for an understanding of the opinion.

BAILEY, J.[45] * * * The only question presented by the record is as to the legal effect upon the property acquired by Jacob Hess in this state of the ante-nuptial contract entered into in Germany between him and his then intended wife. It is claimed that the contract, when considered in connection with the judicial proceedings had thereon, constituted, in legal effect, an adoption of the complainants by Hess, so as to place them upon the same footing, so far as succession to his property and estate was concerned, with the children afterwards born of the marriage then in contemplation. And it is further contended that by the rules of law in force where the contract was made, and which entered into and formed a part of it, the property then owned by Hess and by his intended wife, as well as that afterwards acquired by them, became communal property, in which the children of the family, both natural and adopted, acquired a vested right, and that Hess could not by will divest their right to succeed to such estate as he might leave at his death.

After considering all the evidence, we are left in very grave doubt whether the laws of the grand duchy of Hesse, upon which reliance is placed, are sufficiently proved. But waiving that point, and assuming that the proof is sufficient, and that the rules of law prevailing in Hesse at the date of the contract were as the complainants contend, the question remains whether the antenuptial contract should be enforced in this state, as to property, and especially real property, subsequently acquired by Hess in this state. It should be remembered that at the date of the contract the parties were living at Beerfelden, in the grand duchy of Hesse, and, so far as appears, were intending to remain there permanently. There is nothing either in the contract itself or in the evidence having the least tendency to show that their removal to any other place was then contemplated. The evidence furnished by the contract is all in the direction of showing that their intention was to make Beerfelden their permanent home. The agreement on the part of the bride was "to receive the groom to live at her house," and the contract, after certain stipulations as to the property brought into the marriage by the groom, and as to the rights of the children of the bride by her former marriage, concludes with the provision that "in all other cases not especially enumerated herein the contracting parties subject themselves to the general laws of Germany, especially the rules and customs of the country." In point of fact, Jacob Hess, after his marriage, took up his residence at his wife's house, and made that his domicile, and thereupon engaged at that place in the business of a baker, which he carried on for five years. He then sold out his property there, and emigrated to the United States. It should also be observed that there is a total absence of any express provision in the contract making it applicable to the future acquisitions of the contracting parties. It deals with the property they then

[45] A portion of the opinion has been omitted.

possessed, but makes no reference to such as they might afterwards gain. The only language in the contract on which any reliance is placed, as having reference to future acquisitions, is the following: "As regards their worldly success and subsistence, the bride agrees to receive the groom to live at her house." If these words are correctly translated from the original German, in which the contract was written—and we have heard no suggestion that they are not—they are, to say the least, extremely ambiguous, and we are able to put upon them no rational construction which would make out of them an agreement to subject the future acquisitions of the parties to the provisions of the contract. The most probable and natural interpretation of the words would seem to be that, with a view to providing for the worldly success and the subsistence of the family, the bride agreed to receive the groom to live at her house. They cannot, without importing into them a meaning which does not appear upon their face, be held to have any direct reference to the future acquisitions of the contracting parties, and especially their acquisitions after emigrating from their then residence, and making their permanent domicile in a foreign country.

The property rights of husband and wife, as affected by the marriage contract itself, or by an antenuptial agreement, where the marriage or the antenuptial agreement has been entered into in a foreign country, have always presented questions of no little perplexity and difficulty. Mr. Story, in his treatise on the Conflict of Laws (section 143), says: "The principal difficulty is not so much to ascertain what rule ought to govern in cases of express nuptial contract, at least where there is no change of domicile, as what rule ought to govern in cases where there is no such contract, or no contract which provides for the emergency. Where there is an express nuptial contract, that if it speaks fully to the very point, will generally be admitted to govern all the property of the parties, not only in the matrimonial domicile, but in every other place, under the same limitations and restrictions as apply to other cases of contract. But where there is no express nuptial contract at all, or none speaking to the very point, the question what rule ought to govern is surrounded with more difficulty." The learned author then, after an extended examination of the opinions of the leading law writers in this country and in Europe, and also of the decisions of the Supreme Court of Louisiana—the only court which at that time seems to have given these questions elaborate and careful consideration—lays down the following propositions, which, as he says, although not universally established or recognized in America, have much domestic authority for their support, and have none in opposition to them: "(1) Where there is a marriage between parties in a foreign country, and an express contract respecting their rights and property, present and future, that, as a matter of contract, will be held equally valid everywhere, unless, under the circumstances, it stands prohibited by the laws of the country where it is sought to

be enforced. It will act directly on movable property everywhere. But, as to immovable property in a foreign territory, it will, at most, confer only a right of action, to be enforced according to the jurisprudence rei sitæ. (2) Where such an express contract applies in terms or intent only to present property, and there is a change of domicile, the law of the actual domicile will govern the rights of the parties as to all future acquisitions. (3) Where there is no express contract, the law of the matrimonial domicile will govern as to all the rights of the parties to their present property in that place, and as to all personal property everywhere, upon the principle that movables have no situs, or rather that they accompany the person everywhere. As to immovable property, the law rei sitæ will prevail. (4) Where there is no change of domicile, the same rule will apply to future acquisitions as to present property. (5) But where there is a change of domicile the law of the actual domicile, and not the matrimonial domicile, will govern as to all future acquisitions of movable property; and, as to all immovable property, the law rei sitæ." Story, Confl. Laws, § 184 et seq.

The propositions thus laid down by Judge Story seem to have received the general approval of the courts of this country, so far as there has been occasion to consider them since he wrote.

[The learned justice here commented upon Fuss v. Fuss, 24 Wis. 256, 1 Am. Rep. 180, Castro v. Illies, 22 Tex. 479, 73 Am. Dec. 277, Besse v. Pellochoux, 73 Ill. 285, 24 Am. Rep. 242, Decouche v. Savetier, 3 Johns. Ch. 190, 8 Am. Dec. 478, and Scheferling v. Huffman, 4 Ohio St. 241, 62 Am. Dec. 281, and continued as follows:]

We are therefore of the opinion that the antenuptial contract in this case is not applicable to real property acquired by Hess in this state, after his immigration to this country, but that such property was subject to disposition by him, by deed or will, according to the laws of this state. His will therefore must be held to be valid, so as to vest in his devisees a title which must prevail over any rights derived by the complainants from the antenuptial contract.

We are unable to see that any peculiar force is to be given to the fact that the complainants, at the time Jacob Hess and wife immigrated to this country, were infants, and therefore incapable of consenting to a change of their domicile, or of waiving any rights which were secured to them by the contract. As the contract cannot be held to have any application to the property sought to be reached in this case, no rights of theirs were affected by their being brought to this country, and they had nothing to waive. Even if it be admitted that, by reason of their legal adoption by Jacob Hess, they would have been entitled to succeed to his estate at his death, as his heirs at law, the antenuptial contract furnished no obstacle to the exercise by Hess of his right to dispose of his estate by will, and, he having done so, nothing was left to descend to the complainants, as his heirs at law. Although the complainants may have acquired the status of adopted chil-

dren and heirs at law by the contract and judicial proceedings had in Germany, their inheritance of after-acquired real estate situated in this state must be in accordance with our laws; and by our laws a testator has an absolute right to dispose of his property by will, even to the exclusion alike of his natural or his adopted children. We are of the opinion that the decree of the circuit court is justified by the evidence, and it will accordingly be affirmed. Decree affirmed.

In re FITZGERALD.

(Court of Appeal, 1904. 1 Ch. Div. 573, 73 L. J. Ch. 436.)

Appeal from the decision of Joyce, J. [1903] 1 Ch. 933, the question being whether a restraint on the right of alienation of a life interest, given to a husband in his wife's property by a marriage contract in Scotch form, was valid as against his incumbrancers in England.

By a settlement in English form, dated September 20, 1862, and made in contemplation of the marriage of Sir Gerald Vesey Fitzgerald with Miss Lockhart, Sir Gerald's father covenanted with the trustees that his heirs, executors or administrators would, within six months after his death, pay to the trustees the sum of £6,000., to be held by them upon trust for investment as therein mentioned, and to pay the income of the trust fund to Sir Gerald and his assigns during his life, and after his death to Lady Fitzgerald during her life, and after the death of the survivor to stand possessed of the trust fund in trust for the issue of the intended marriage as therein declared.

By this deed Sir Gerald also assigned to the trustees a policy of insurance for £4,000. upon his own life to be held by them upon the same trust.

On the same day a marriage contract in Scotch form was executed by Sir Gerald and Miss Lockhart, whereby, after a recital of the English settlement and in consideration of the provisions therein contained, Miss Lockhart assigned, conveyed, disposed, and made over to the trustees of the English settlement all and sundry lands and heritages, goods, gear, debts, and sums of money, and generally her whole property heritable and movable (with certain specified small exceptions), to be held by the trustees in trust for the ends, uses, and purposes after mentioned, namely: "First, for payment of the expenses of executing this trust; second, for payment of the free annual proceeds of the trust estate" to Miss Lockhart "during all the days of her life, and that on her own receipt alone exclusive of the jus mariti and right of administration" of Sir Gerald; "third, in case the said Sir Gerald shall be the survivor of the spouses, for payment of the whole free annual proceeds of the estate to him during all the days of his life after the death of" Miss Lockhart, "declaring that all payments to the said Sir Gerald shall be strictly alimentary, and shall not be assignable nor liable to arrestment or any other legal

diligence at the instance of his creditors; fourth, on the death of the survivor of the said spouses the trustees shall pay over or assign the whole trust funds and estate in their hands" to the child or children of the marriage as therein mentioned.

Both deeds were executed in Scotland.

On September 23, 1862, the marriage was solemnized in Scotland. At the time of the execution of the deed Sir Gerald was domiciled and resident in England and Miss Lockhart was domiciled and resident in Scotland. After the celebration of the marriage Sir Gerald continued to reside in England and retained his English domicile. The original trustees of the setttlement (six in number) were (with one exception) Englishmen resident in England. At the time when the summons before Joyce, J., was issued all the then trustees were Englishmen resident in England.

The funds originally comprised in the Scotch contract consisted of two Scotch heritable bonds for the respective sums of £6,000. and £7,200., which were secured upon heritable or immovable property in Scotland, and a sum of £500. cash, which was paid over to the trustees for investment, and was invested by them in Consols. The heritable bonds were assigned to the trustees by a separate deed. At the time when the summons was issued the investment of part of the £7,200. had been changed into English securities. By Scotch law heritable bonds of this character are treated as real estate, except for certain purposes specified in the Titles to Land Consolidation (Scotland) Act 1868 (31 & 32 Vict. c. 101) § 117.

There was only one child of the marriage, a daughter, born on June 19, 1863.

Lady Fitzgerald died on May 16, 1901.

Between the years 1863 and 1901 Sir Gerald and Lady Fitzgerald created in England various incumbrances upon their respective interests under the English and Scotch settlements, in some of which Miss Fitzgerald also joined.

Subsequently Sir Gerald further incumbered his life interest under the two settlements. The defendant Colonel Harford was the first mortgagee of Sir Gerald's life interest under the Scotch settlement.

On October 12, 1901, the summons was taken out by the trustees, who were all then domiciled in England, asking (inter alia) for the determination of the question whether Sir Gerald was entitled for his life to the income of the trust funds comprised in the Scotch marriage contract free from incumbrance and without power of alienation, or who was now entitled to the income.

An affidavit was made by Mr. Graham Murray, formerly Lord Advocate of Scotland, in which he said: "By the law of Scotland it is possible for a person to create a life interest in favor of another person, and, by declaring that life rent to be alimentary, to exclude, so far as the life interest does not exceed in amount a reasonable provision, the diligence of ordinary creditors, and restrain all power of anticipation. Where, therefore, as here, a lady by antenuptial mar-

riage contract conveys her funds to trustees, it is possible for her to create a life rent of these funds in favor of her surviving husband, and to exclude his ordinary creditors and to restrain him from anticipation."

There was also evidence that by Scotch law "alimentary" creditors of the husband could arrest the alimentary provision, but that no other creditors could do so, and also that, if in the case of such an alimentary provision the husband failed to maintain the children of the marriage, they would be entitled to attach the alimentary provision made for him.

Joyce, J., held that, even if the construction and effect of the Scotch contract were properly determinable by the law of Scotland, its validity and operation must be determined by the law of England; and that, inasmuch as the prohibition of alienation of the alimentary provision was, according to English law, repugnant and contrary to public policy, the husband's mortgagees were entitled to receive payment of the income from the trustees.

Sir Gerald appealed.

Cozens-Hardy, L. J.,[46] read his judgment as follows: The first question for consideration on this appeal is whether what I may shortly describe as the Scotch settlement is subject to the law of Scotland, or whether it must be governed by English law. Now this Scotch settlement dealt with the property of a domiciled Scotch lady, who was about to marry a domiciled Englishman, and there is no doubt that the "matrimonial domicile" was English. It is not suggested that a permanent residence in Scotland after the marriage was contemplated. As a general rule the law of the matrimonial domicile is applicable to a contract in consideration of marriage. But this is not an absolute rule. It yields to an express stipulation that some other law shall apply. See Van Grutten v. Digby, [1862] 31 Beav. 561, in which case the matrimonial domicile was French, but the contract, though made in France and void by French law, was nevertheless treated by Sir John Romilly as valid so far as it related to property within the jurisdiction. See, also, Viditz v. O'Hagan, [1899] 2 Ch. 569. The decision in that case was reversed by the Court of Appeal, but not on a ground in any way affecting this point. It is not necessary that there should be an express stipulation. It is sufficient if the court arrives at the conclusion that the parties in fact contracted with reference to some law other than that of the matrimonial domicile.

Applying these principles to the Scotch settlement, I find several important indications: (a) The great bulk of the property, namely, £13,200., was invested in heritable bonds. It has been settled by a chain of authorities, which ought not now to be reviewed by us, namely, by Grant, M. R., in Johnstone v. Baker, 4 Madd. 474, note, by Leach,

[46] The concurring opinion of Vaughan-Williams, L. J., and the dissenting opinion of Stirling, L. J., have been omitted.

M. R., in Jerningham v. Herbert, 4 Russ. 388, 28 R. R. 136, and by Wigram, V. C., in Allen v. Anderson, [1846] 5 Hare, 163, that heritable bonds must be regarded in our courts as immovables. If so, it can scarcely be denied that the lex loci—i. e., the law of Scotland—must apply to the extent of the £13,200. I am aware that there has been a change of investment of part of this sum into English securities, but this change cannot alter the law applicable to the settlement. I may add that, as to the £13,200., the matter does not rest in contract. There is an actual completed assignment of the heritable bonds. (b) There was, however, £500. cash belonging to the lady, which was paid over to the trustees for investment, and which was, in fact, invested in Consols, although it might have been invested in heritable securities in Scotland. It seems to me that this sum cannot fairly be treated as intended to be subject to a different law from that which is applicable to the bulk of the property. (c) The whole frame of the settlement is in Scotch form, and the limitations are of such a nature that they can only take effect if Scotch law is to be applied. I therefore feel bound to treat this as a settlement made in Scotland by a domiciled Scotch lady of Scotch property, in Scotch form, and subject to Scotch law. The trustees of this Scotch settlement must in Scotland follow the Scotch law, and their residence in England, or their English domicile, is irrelevant. This being so, it follows, in my opinion, that we are bound to hold that Sir Gerald Fitzgerald takes such interest, and such interest only, as the courts of Scotland would declare him entitled to. Anstruther v. Adair, 2 My. & K. 513, 39 R. R. 263. There ought to be no difference in a matter of this kind between the Court of Session and the High Court. The nature and extent of his interest cannot depend upon his domicile, although his capacity to deal with his interest may perhaps depend upon his domicile. To take the somewhat analogous case of a life interest in English property given by the will of a domiciled Englishman for the separate use of a married woman, without power of anticipation, it has never, so far as I am aware, been suggested that the nature and extent of her interest varied according as her domicile was, or was not, English. The trust would be regarded in our courts as valid and operative, even though by the law of her domicile neither the separate use nor the restraint upon anticipation was recognised. And, on general principles, the same view ought to be adopted by the courts of the country in which the married woman was domiciled. In short, by the law of England, it is the Scotch law which must be applied to this Scotch settlement.

It is, however, strongly urged that a strictly alimentary provision for an adult male is not only unknown to and inconsistent with the provisions of English law, as in general it undoubtedly is, but that it is contrary to public policy, and ought therefore to be wholly disregarded in an English court. I cannot adopt this argument. There is nothing immoral in such a provision. Indeed, there are many in-

stances in which pensions or retiring allowances are by statute made not transferable, or liable to be attached by any legal process. I may refer to the pension allowed to a retiring clergyman under the Incumbents' Resignation Act of 1871, and to the observations of the Court of Appeal on that statute in Gathercole v. Smith, [1881] 17 Ch. D. 1. Moreover, it has been long settled that at common law, and apart from any statutory enactments prohibiting assignment, certain salaries or pensions are inalienable. For example, the half-pay of an officer. In Flarty v. Odlum, [1790] 3 T. R. 681, 1 R. R. 791, Lord Kenyon said: "I am clearly of opinion that this half-pay could not be legally assigned by the defendant. * * * Emoluments of this sort are granted for the dignity of the state, and for the decent support of those persons who are engaged in the service of it. It would therefore be highly impolitic to permit them to be assigned; for persons, who are liable to be called out in the service of their country, ought not to be taken from a state of poverty. * * * It might as well be contended that the salaries of the judges, which are granted to support the dignity of the state and the administration of justice, may be assigned." In the following year the same question came up for consideration in Lidderdale v. Duke of Montrose, [1791] 4 T. R. 248, 250, 2 R. R. 375. This was an action by an officer on half-pay against the Paymasters General of the Army to recover arrears of his half-pay, and the only question was whether an assignment by way of mortgage, of which the defendants had due notice, justified them in withholding the money from the plaintiff. The court were clearly of opinion that, "on principles of public policy, as well as on account of the interest of the officers themselves, by law such assignments were void." The mortgagee was not party to this action, but it seems to have been thought that he might obtain equitable relief, and he accordingly filed a bill in the Exchequer. See Stone v. Lidderdale, [1795] 2 Anstr. 533; 3 R. R. 622. It was argued that the assignment was good in equity, as a transfer of any valuable contingency or possibility, if made for good consideration, is affirmed in equity. But Macdonald, C. B., in a considered judgment, declined to accept this view, and held that the plaintiff was not entitled to any relief in equity in respect of the mortgage. In short, he declined to affect the conscience of the mortgagor in respect of future instalments of the half-pay.

In my opinion it is impossible to disregard this "alimentary provision" on the ground of public policy. The Scotch court would declare that the interest given to Sir Gerald cannot be assigned, and would disregard the claims of his specific mortgagees, and it is our duty to follow and adopt the Scotch law. Anstruther v. Adair, 2 My. & K. 513, 39 R. R. 263.

But then it was urged that Sir Gerald could bind, and did bind, the income as and when it reaches the hands of the trustees in Eng-

land, and that, whatever might be the rights of his alimentary creditors, he himself ought not to be allowed to claim from the trustees the income which he has, by a contract binding on his conscience, charged in favor of his mortgagees. I doubt whether this doctrine, which is explained and illustrated by Lord Macnaghten in Tailby v. Official Receiver, [1888] 13 App. Cas. 523, 543, has any application to a vested life interest, the assignment of which takes effect, if at all, for reasons wholly independent of conscience. An assignment of a vested equitable interest is complete and operative, though voluntary. It in no way depends upon contract, or upon anything further to be done by the assignor. The doctrine applies only where there is no present property capable of assignment, such as possibilities and expectancies. Stone v. Lidderdale, 2 Anstr. 533, 3 R. R. 622, is an authority against the respondent's contention, and I know of no authority in its favor. I may observe that the defendant Lidderdale was a domiciled Englishman, whose general capacity to contract was undoubted. Moreover, this contention is really only another way of presenting the argument that we ought to disregard the Scotch law. If the life interest is capable of assignment, the court would grant specific performance of the contract, and would aid the mortgagees by granting an injunction. If, however, as in Stone v. Lidderdale, 2 Anstr. 533, 3 R. R. 622, the interest is non-assignable, I think it follows that no effect can be given to a deed purporting to assign by way of anticipation. The decision of the House of Lords in Scott v. Allnutt, 2 Dow & C. 404, which was relied upon, does not really touch the case.

In my opinion, the order of Joyce, J., was wrong, in so far as it declared that the whole of the income during the life of Sir Gerald is payable to his assignees or incumbrancers, according to their respective priorities. If the amount of the income were very large, any excess beyond a reasonable amount would, according to the Scotch law, pass to the assignees or incumbrancers, but I do not understand that it is suggested that there is any excess in the present case. I think the declaration should be to the effect that Sir Gerald is entitled to the whole income during his life, free from the claim of any assignees or incumbrancers, but without prejudice to the rights (if any) of his alimentary creditors, or of Miss Fitzgerald, and without prejudice to any prior payment in respect to the policy, which is the subject of another appeal by Miss Fitzgerald.[47]

[47] It has been held that the parties may stipulate for the application of a particular system of law. Este v. Smyth, 18 Beav. 112 (1854). Contra: Bourcier v. Lanusse, 3 Martin, 581 (1815). See, also, Westlake, Priv. Int. Law, 75–79; Dicey, Conflict of Laws, 637–639; Foote, Priv. Int. Jurispr. 332–337.

HUSBAND AND WIFE—PARENT AND CHILD.—The personal rights of husband and wife, in so far as they concern their personal freedom and the control of

parents over their children, are matters of police and subject to the local law. See Minor, Conflict of Laws, §§ 79, 83.

As to duty to provide support. See De Brimont v. Penniman, 10 Blatchford, 436 (1873); McDonald v. McDonald, 8 Bell & Murray (2d Series) 331–334 (1846); Minor, Conflict of Laws, § 83. In regard to the application of bastardy statutes, see Graham v. Monsergh, 22 Vt. 543 (1850); State v. Helmer, 21 Iowa, 370 (1866); Colbey v. People, 85 Ill. 336 (1877); Moore v. State, 47 Kan. 772, 28 Pac. 1072, 17 L. R. A. 714 (1892); State v. Patterson, 18 S. D. 251, 100 N. W. 162 (1904).

CONTINENTAL LAW.—a. *Marriage Contract.*—1. *France.*—The ordinary rules governing contracts apply generally to marriage contracts. App. Paris, Dec. 10, 1901 (D. 1905, 2, 128). Where the intent of the parties does not appear from the surrounding circumstances, the law of the matrimonial domicile will usually prevail. Cass. July 11, 1855 (D. 1856, 1, 9).

In regard to its form, the lex loci applies. Cass. April 18, 1865 (S. 1865, 1, 317). But it has been held that a compliance with the national law of the parties is sufficient. App. Douai, Jan. 13, 1887 (D. 1887, 2, 121). In favor of optional character, see, also, Institute of International Law, 10 Annuaire, 77–78, art. 13).

Imperative rules of the national law of the parties in regard to the matrimonial property régime, constituting in reality limitations upon their capacity, will be binding upon them everywhere. Trib. Civ. Seine, Aug. 20, 1884 (12 Clunet, 76).

Capacity to change the matrimonial property régime, after the celebration of the marriage, has been held to depend by some courts upon the national law of the parties. App. Orléans, Feb. 24, 1904 (31 Clunet, 680); Trib. Civ. Seine, March 21, 1907 (34 Clunet, 1124). By others, upon the law applicable to the matrimonial régime and the intent of the parties. Cass. July 11, 1855 (S. 1855, 1, 699). By others again upon the law of the state where the contract was made. App. Toulouse, May 7, 1866 (D. 1866, 2, 109).

Article 1395, French Civil Code, which provides that matrimonial agreements cannot be altered after the celebration of the marriage, has been held to be inapplicable when the marriage takes place outside of France. See note 71 to article 1395, Sirey, Les Codes Annotés.

2. *Germany.*—According to article 15, Law Intr. Civ. Code, a marriage contract may be entered into by parties, notwithstanding their national law at the time of the marriage prohibits it, if the husband subsequently acquires the German nationality, or if the husband and wife, being foreigners, are residents of Germany.

3. *Italy.*—The common national law of the parties will apply to marriage contracts. Art. 9, Prel. Disp. Civ. Code; App. Palermo, July 10, 1899 (Foro It. 1900, 1, 501). In the absence of a common national law, that of the husband prevails. Cass. Turin, April 26, 1878 (Monitore 1878, p. 1093); Cass. Turin, Jan. 17, 1877 (Foro It. 1877, 1, 764).

b. *No Marriage Contract.*—1. *France.*—The intention of the parties prevails, which, if not expressed, will be gathered from the surrounding circumstances. Cass. July 18, 1905 (33 Clunet, 446); Cass. March 9, 1891 (18 Clunet, 549). No presumption seems to exist either in favor of the law of the matrimonial domicile or in favor of their common nationality. App. Paris, Dec. 7, 1887 (D. 1888, 2, 265) and note by Ch. de Boeck; Trib. Civ. Millau, July 18, 1903, and Montpellier, April 25, 1904 (32 Clunet, 377). *Contra*, and in favor of the law of matrimonial domicile, App. Lyon, Feb. 16, 1903 (31 Clunet, 401).

A change of nationality has no effect upon the matrimonial property régime. Trib. Civ. Seine, Dec. 28, 1900 (D. 1902, 2, 193), and note by Ch. de Boeck.

The above rules apply equally to personal and real property. Cass. Jan. 30, 1854 (D. 1854, 1, 61); App. Paris, Feb. 5, 1887 (14 Clunet, 190); Trib. Civ. Versailles, Aug. 3, 1893 (21 Clunet, 544). Subject, of course, to the ordinary rules of public order. Cass. April 4, 1881 (S. 1883, 1, 65), and note by L. Renault.

Article 2121 of the Civil Code, which gives to a married woman a lien upon her husband's estate for the proper administration of her property, is held to be intended for her protection. Hence the national law of the parties is applied. Cass. May 20, 1862 (S. 1862, 1, 673); Cass. Feb. 5, 1872 (S. 1872, 1, 190).

2. *Germany.*—The national law of the husband at the time of the marriage governs (article 15, Law Intr. Civ. Code), subject, however, to renvoi (article 27). See, also, article 16, Law Intr. Civ. Code.

A change of nationality on the part of the husband will not affect the property régime. Article 15, Law Intr. Civ. Code; 6 R. G. 223 (April 18, 1882). See, also, G. Planck, Bürgerliches Gesetzbuch, vol. VI, art. 15, 1 c.

The above rules do not apply to property in another state under whose law special rules obtain. Article 28, Law Intr. Civ. Code.

The validity of gifts between husband and wife has been held to be governed by their personal law and not by the law applicable to their matrimonial property régime. R. G. Oct. 15, 1907 (Juristische Wochenschrift 1907, p. 155).

3. *Italy.*—The common national law of the parties governs. Article 6, Prel. Disp. Civ. Code. In the absence of a common nationality that of the husband prevails. Trib. Civ. Naples, May 4, 1877 (Foro It. 1878, 1, 126); App. Turin, April 27, 1901 (Guirispr. Torinese 1901, p. 736).

A change of nationality has no effect upon the property régime. Cass. Turin, May 11, 1882 (Cass. Torinese, 1882, 1, 377).

The Institute of International Law has pronounced itself in favor of the first matrimonial domicile of the parties unless a contrary intent appears from the surrounding circumstances (article 14). It favors, also, the view that the matrimonial property régime shall embrace both the movable and immovable property of the parties, except such immovables as are subject to a special law (article 12), and that the property rights of the parties shall not be affected by a change of domicile or nationality by either husband or wife, reserving, however, the rights of third parties (article 15). See 10 Annuaire, 77, 78.

With respect to the law governing marriage contracts and matrimonial property rights in the absence of a marriage contract, see, also, Draft of Convention signed at the Hague July 17, 1905 (Appendix B, II). Consult, further, E. Audinet, Observations sur les effets extraterritoriaux des régimes matrimoniaux, 2 Darras, 102–109; Raoul Jay, De l'immutabilité des conventions matrimoniales en droit international, 12 Clunet, 527–537; V. Baligaud, Der räumliche Geltungsbereich der Rechtsätze über den Ehevertrag, 17 Niemeyer, 202–223; W. Silberschmidt, Die Kollision zwischen ehelichem Güterrecht und Erbrecht nach deutschem bürgerlichen Rechte, 8 Niemeyer, 97–117.

c. *Husband and Wife—Parent and Child.*—The national law of the parties governs. *Italy*, App. Lucca, April 14, 1882 (Foro It. 1882, 1, 768). *Germany*, R. G. Feb. 15, 1906 (16 Niemeyer, 298); O. L. G. Dresden, May 10, 1902 (12 Niemeyer, 466). This rule is subject to renvoi. Article 27, Law Intr. Civ. Code. German law will apply where the husband has lost his German nationality, if the wife has retained hers. Article 14, Law Intr. Civ. Code.

The national law of the parent, subject to the rules concerning public order, will determine the rights of the parent with respect to the person or property, whether real or personal, of the child. *France*, Cass. March 14, 1877 (S. 1878, 1, 25). *Italy*, Genoa, July 16, 1891 (Monitore 1891, p. 823). *Germany*, article 19, Law Intr. Civ. Code. But if both parents have lost, and the child has retained, the German nationality, German law will govern. Article 19. The national law has been applied, even with respect to the religious education of the child. K. G. April 5, 1906 (16 Niemeyer, 320); K. G. Feb. 2, 1901 (11 Niemeyer, 95).

An exception to the application of the national law exists in Germany with respect to property in a jurisdiction under whose law a different law obtains. Article 28, Law Intr. Civ. Code.

The question whether the child has a lien upon the property of the parents for the faithful performance of their duties as administrators of his estate depends upon the national law of the parents and not upon that of the child. *France*, Cass. Jan. 13, 1873 (S. 1873, 1, 13) App. Bordeaux, July 23, 1897 (S. 1900, 2, 89).

The national law governs, also, all questions relating to the duty to provide support. *France*, Trib. Tunis, April 5, 1905 (33 Clunet, 135). Where the national law makes no provision for support the lex fori has been applied, for reasons of public order, to foreigners residing in France. Cass. July 22, 1903 (D. 1904, 1, 197); App. Douai, March 26, 1902 (30 Clunet, 599). *Italy.* The

law of the forum applies on the ground of public order. App. Milan, Feb. 23, 1904 (Monitore 1904, p. 209).

With respect to the rights of an illegitimate child the German law provides that the father's duty to support such child shall be governed by the national law of the mother at the birth of the child. But no greater rights can be asserted than those allowed under German law. Article 21, Law Intr. Civ. Code. In France and Italy an action against the father for the maintenance of an illegitimate child will not lie (la recherche de la paternité est interdite). Article 340, French Civ. Code; article 189, Italian Civ. Code.

See, with respect to the law governing the rights and duties of husband and wife, Draft of Convention, Signed at the Hague July 17, 1905, Appendix B, II.

CHAPTER IV.

INHERITANCE.

SECTION 1.—INTESTATE SUCCESSION.

MOEN v. MOEN.

(Supreme Court of South Dakota, 1902. 16 S. D. 210, 92 N. W. 13.)

See ante, p. 587, for a report of the case.

ENNIS v. SMITH.

(Supreme Court of the United States, 1852. 14 How. 400, 14 L. Ed. 472.)

WAYNE, J.[2] * * * For several hundred years upon the continent, and in England, from reported cases for a hundred years, the rule has been, that personal property, in cases of intestacy, is to be distributed by the law of the domicile of the intestate at the time of his death. It has been universal for so long a time that it may now be said to be a part of the jus gentium. Lord Thurlow speaks of it as such in the House of Lords, in the case of Bruce v. Bruce, 2 Bos. & Pul. 226. Erskine, in his Institutes of the Law of Scotland (B. 3, tit. 9, § 4, 644), says this rule is founded on the laws of nations. He says: "When a Scotsman dies abroad sine animo remanendi, the legal succession of his movable estate in Scotland must descend to his next of kin according to the law of Scotland; and where a foreigner dies in this country sine animo remanendi, the movables which he brought with him hither ought to be regulated, not by law of the country in which they locally were, but that of the proprietors patria, or domicile whence he came, and whither he intends again to return. This rule is founded in the law of nations, and the reason of it is the same in both cases, that since all succession ab intestatio is grounded upon the presumed will of the deceased, his estate ought to descend to him whom the law of his own country calls to the succession, as the person whom it presumes to be most favored by the deceased."

The law of Scotland had been different in this particular, but it was brought into harmony with the law of the rest of Europe by the decision of the House of Lords, in Bruce v. Bruce, 6 Brown's Par. Cases, 550, 566, 2 Bos. & Pul. 226, 230, 231; Lord Stair's Institutes, B. 3, tit. 8, § 5; Hogg & Lashley, P. C. 577, House of Lords, June 25, 1788; Robertson on Personal Success. 131; Omman v. Bingham,

[2] A portion of the opinion only is given.

House of Lords, March 18, 1776; Colville and Landlord v. Brown & Brown, Dict. Success. Ap. p. 1, 4; W. & S. 28.

The earliest case reported in the English books, is that of Pipon v. Pipon, Amb. 6, 27. Lord Hardwicke recognized in it the rule that the personal estate, in cases of intestacy, followed the person, and becomes distributable according to the law or custom of the place where the intestate lived. Among other reasons given by him is, that a contrary rule would be extremely mischievous, and would affect our commerce. No foreigner could deal in our funds but at the peril of his effects going according to our laws, and not those of his own country. He reaffirmed the same in a few years afterwards, in Thorne v. Watkins, 2 Ves. 35. Lord Kenyon did the same when he was Master of the Rolls in 1787, in Killpatrick v. Killpatrick, which will be found cited in Robertson on Personal Succession, 116. In 1790, the House of Lords acted upon the rule, in Bruce v. Bruce, and two years afterwards, in Hogg v. Lashley. Many cases followed in the English courts, and the only question since has been, what was the domicile of the intestate at the time of his death? In the United States the rule has been fully recognized. Olivier v. Townes, 2 Mart. N. S. (La.) 99; Shultz v. Pulver, 3 Paige (N. Y.) 182; Mundell v. Perry, 2 Gill & J. (Md.) 193, 224, 228.

The rule prevails, also, in the ascertainment of the person who is entitled to take as heir or distributee. It decides whether primogeniture gives a right of preference, or an exclusive right to take the succession; whether a person is legitimate or not to take the succession; whether the person shall take per stirpes or per capita, and the nature and extent of the right or representation. Story's Conflict of Laws.[3] * * *

SECTION 2.—TESTAMENTARY SUCCESSION.

CARPENTER v. BELL.

(Supreme Court of Tennessee, 1896. 96 Tenn. 294, 34 S. W. 209.)

BEARD, J. The will which is the subject of this litigation was executed by a feme covert, who was, at the date of its execution, as well as at the time of her death, a resident of the state of Kentucky, and

[3]Accord: Pipon v. Pipon, Ambl. 25 (1744); Bempde v. Johnstone, 3 Ves. Jr. 198 (1796); Somerville v. Lord Somerville, 5 Ves. Jr. 750 (1801); Bruce v. Bruce, 2 Bos. & P. 230 (1790) note; Desesbats v. Berquier, 1 Bin. (Pa.) 336, 2 Am. Dec. 448 (1808).

Subsequent retroactive legislation has no effect upon the succession to personal property. Lynch v. Provisional Gov. of Paraguay, L. R. 2 P. & D. 268 (1871); In re Aganoor's Trusts, 64 L. J. Ch. 521 (1895).

Where a person dies without natural heirs, the personal property will be-

by it the testatrix undertakes to dispose of real property in this state. Notwithstanding all the formalities required by our statutes to validate such a will have been observed in this case, yet it is insisted that, as the law of Kentucky incapacitates a married woman from making a disposition of such property by last will and testament, this incapacity follows the instrument into this state, and defeats the devise of realty located here. The bill in this cause is filed on this theory. This contention is unsound, as is well settled by the authorities. As to immovable property, the rule is that the lex rei sitæ governs as to the capacity or incapacity of the testator, the extent of his power of disposition, and the forms and solemnities necessary to give the will its due authority and effect. Pritch. Wills, § 53; Williams v. Saunders, 5 Cold. 60; Ror. Int. St. Law, 288, note; Story, Confl. Laws, § 474; White v. Howard, 46 N. Y. 144; Ford v. Ford, 70 Wis. 19, 33 N. W. 188, 5 Am. St. Rep. 117. The result is that the decree of the chancellor, dismissing complainants' bill, will be affirmed, with costs.

UNITED STATES v. FOX.

(Supreme Court of the United States, 1876. 94 U. S. 315, 24 L. Ed. 192.)

Error to the Court of Appeals of the State of New York.

FIELD, J.* The sole question for our consideration in this case is the validity of a devise to the United States of real estate situated in the state of New York. The question is to be determined by the laws of that state. It is not pretended that the United States may not acquire and hold real property in the state, whenever such property is needed for the use of the government in the execution of any of its powers; as, for instance, when needed for arsenals, fortifications, light-houses, custom-houses, court-houses, barracks, hospitals, or for any other of the many public purposes for which such property is used. And when the property cannot be acquired by voluntary arrangement with its owners, it may be taken against their will by the United States in the exercise of their power of eminent domain, upon making just compensation—a power which can be exercised in their own courts, and would always be resorted to, if through caprice of individuals or the hostility of the state Legislature, or other cause, harassing conditions were attached to the acquisition of the required property in any other way. Kohl v. United States, 91 U. S. 367, 23 L. Ed. 449.

long to the state in which it is found, and not to the state in which the deceased was domiciled. In re Barnett's Trusts, [1902] 1 Ch. 847. So *France*, App. Bordeaux, Aug. 17, 1853 (S. 1854, 2, 257); Trib. Civ. Seine, June 22, 1897 (24 Clunet, 1034), semble.

*The statement of facts has been omitted.

The power of the state to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. McCormick v. Sullivant, 10 Wheat. 202, 6 L. Ed. 300. The power of the state in this respect follows from her sovereignty within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the federal government. The title and modes of disposition of real property within the state, whether inter vivos or testamentary, are not matters placed under the control of federal authority. Such control would be foreign to the purposes for which the federal government was created, and would seriously embarrass the landed interests of the state.

Statutes of wills, as is justly observed by the Court of Appeals, are enabling acts, and prior to the statute of 32 Hen. VIII there was no general power at common law to devise lands. The power was opposed to the feudal policy of holding lands inalienable without the consent of the lord. The English statute of wills became a part of the law of New York upon the adoption of her Constitution in 1777, and, with some modifications in its language, remains so at this day. Every person must, therefore, devise his lands in that state within the limitations of the statute or he cannot devise them at all. His power is bounded by its conditions. That statute provides that a devise of lands may be made "to any person capable by law of holding real estate; but no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise."

The term "person" as here used applies to natural persons, and also to artificial persons—bodies politic, deriving their existence and powers from legislation—but cannot be so extended as to include within its meaning the federal government. It would require an express definition to that effect to give it a sense thus extended. And the term "corporation" in the statute applies only to such corporations as are created under the laws of the state. It was so held by the Court of Appeals in White v. Howard, 46 N. Y. 164, 165, and its construction of the statute is conclusive upon us. A devise to the United States of real property situated in that state is, therefore, void.

Decree affirmed.[4]

[4] So as to the formal requirements of the will. Succession of Hasling, 114 La. 294, 38 South. 174 (1905).

In a number of jurisdictions it is sufficient under statute that the will in formal respects comply with the law of the place where it was executed. See

MOULTRIE v. HUNT.

(Court of Appeals of New York, 1861. 23 N. Y. 394.)

Benjamin F. Hunt, domiciled in Charleston, S. C., executed a will, which covered both real and personal property, in accordance with the law of South Carolina. He subsequently removed his domicile to New York, where he died, leaving personal property within the state. Under the Revised Statutes of New York one of the requisites of a will was that the testator should, at the time of subscribing it, or at the time of acknowledging it, declare in the presence of at least two attesting witnesses that it is his last will and testament. Such a declaration was not required by the law of South Carolina and was not made by Hunt. The will was admitted to probate by a decree of the surrogate of New York county, N. Y., as a will validly executed according to the law of South Carolina, which decree was affirmed by the Supreme Court. An appeal was taken to the Court of Appeals.[5]

DENIO, J.[6] * * * The question in the present case is whether, inasmuch as the testator changed his domicile after the instrument was signed and attested, and was, at the time of his death, a resident citizen of this state, he can, within the sense of the law of comity, be said to have made his will in South Carolina. The paper which was signed at Charleston had no effect upon the testator's property while he remained in that state, or during his lifetime. It is of the essence of a will that, until the testator's death, it is ambulatory and revocable. No rights of property, or powers over property, were conferred upon any one by the execution of this instrument; nor were the estate, interest or rights of the testator in his property in any way abridged or qualified by that act. The transaction was, in its nature, inchoate and provisional. It prescribed the rules by which his succession

2 L. R. A. (N. S.) 426–430. So in England with respect to British subjects under Lord Kingsdown's Act (24 & 25 Vict. c. 114) §§ 1–2.

So as to validity of a trust in real property. Jones v. Habersham, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401 (1883); Ford v. Ford, 80 Mich. 42, 44 N. W. 1057 (1890); Mount v. Tuttle, 183 N. Y. 358, 76 N. E. 873, 2 L. R. A. (N. S.) 428 (1906). But see In re Piercy, [1895] 1 Ch. 83.

So as to effect and operation of a will—e. g. whether it will effect a conversion of the realty into personalty. Ford v. Ford, 70 Wis. 19, 33 N. W. 188, 5 Am. St. Rep. 117 (1887); Id., 72 Wis. 621, 40 N. W. 502 (1888); Clarke's Appeal, 70 Conn. 195, 39 Atl. 155 (1898), affirmed 178 U. S. 186, 20 Sup. Ct. 873, 44 L. Ed. 1028 (1900). So as to effect of a devise. West v. Fitz, 109 Ill. 425 (1884). So as to effect of the subsequent birth of children upon the will. Ware v. Wisner (C. C.) 50 Fed. 310 (1883). Or upon a devise. Van Wickle v. Van Wickle, 59 N. J. Eq. 317, 44 Atl. 877 (1899). So whether after-acquired property passes under the will. Applegate v. Smith, 31 Mo. 166 (1860).

See, in general, 2 L. R. A. (N. S.) 408–469.

[5] This statement of facts has been substituted for that of the original report.

[6] A part of the opinion and the dissenting opinion of Davies, J., have been omitted.

should be governed, provided he did not change his determination in his lifetime. I think sufficient consideration was not given to this peculiarity of testamentary dispositions, in the view which the learned surrogate took of the case. According to his opinion, a will, when signed and attested in conformity with the law of the testator's domicile, is a "consummate and perfect transaction." In one sense it is, no doubt, a finished affair; but I think it is no more consummate than a bond would be which the obligator had prepared for use by signing and sealing, but had kept in his own possession for future use. The cases, I concede, are not entirely parallel; for a will, if not revoked, takes effect by the death of the testator, which must inevitably happen at some time, without the performance of any other act on his part, or the will of any other party; while the uttering of a written obligation, intended to operate inter vivos, requires a further volition of the party to be bound, and the intervention of another party to accept a delivery, to give it vitality. But, until one or the other of these circumstances—namely, the death, in the case of a will, or the delivery, where the instrument is an obligation—occur, the instrument is of no legal significancy. In the case of a will it requires the death of the party, and in that of a bond a delivery of the instrument, to induce it with any legal operation or effect. The existence of a will, duly executed and attested, at one period during a testator's lifetime, is a circumstance of no legal importance. He must die leaving such a will, or the case is one of intestacy. Betts v. Jackson, 6 Wend. 173–181. The provisions of a will made before the enactment of the Revised Statutes, and with entire conformity with the law as it then existed, but which took effect by the death of the testator afterwards, were held to be annulled by certain enactments of these statutes respecting future estates, notwithstanding the saving contained in the repealing act, to the effect that the repeal of any satutory provision shall not affect any act done, etc., previous to the time of the repeal. De Peyster v. Clendening, 8 Paige, 295; 2 Rev. St. (1st Ed.) p. 779, § 5; Bishop v. Bishop, 4 Hill, 138. The Chancellor declared that the trusts and provisions of the will must depend upon the law as it was when it took effect by the death of the testator; and the Supreme Court affirmed that doctrine. There is no distinction, in principle, between general acts bearing upon testamentary provisions, like the statute of uses and trusts, and particular directions regarding the formalities to be observed in authenticating the instrument; and I do not doubt that all the wills executed under the former law, and which failed to conform to the new one, where the testator survived the enactment of the Revised Statutes, would have been avoided, but for the saving in the seventieth section, by which the new statute was not to impair the validity of the execution of a will made before it took effect. 2 Rev. St. (1st Ed.) p. 68, pt. 2, c. 6, tit. 1. If, as has been suggested, a will was a consummated and perfect transaction before the death of a testator, no change in the law subsequently

made would affect it—the rule being, that what has been validly done and perfected respecting private rights under an existing statute is not affected by a repeal of the law. Reg. v. Inhabitants of Denton, 14 Eng. L. Eq., 124, per Lord Campbell, C. J.

If then, a will legally executed under a law of this state, would be avoided by a subsequent change made in the law, before the testator's death, which should require different or additional formalities, it would seem that we could not give effect to one duly made in a foreign state or country, but which failed to conform to the laws of this state, where, at the time of its taking effect by the testator's death, he was no longer subject to the foreign law, but was fully under the influence of our own legal institutions. The question in each case is, whether there has been an act done and perfected under the law governing the transaction. If there has been, a subsequent change of residence would not impair the validity of the act. We should be bound to recognize it by the law of comity, just as we would recognize and give validity to a bond reserving eight per cent. interest, executed in a state where that rate is allowed, or a transfer of property which was required to be under seal, but which had in fact been executed by adding a scroll to the signer's name in a state where that stood for a seal or the like. An act done in another state, in order to create rights which our courts ought to enforce on the ground of comity, must be of such a character that if done in this state, in conformity with our laws, it could not be constitutionally impaired by subsequent legislation. An executed transfer of property, real or personal, is a contract within the protection of the Constitution of the United States, and it creates rights of property which our own Constitution guarantees against legislative confiscation. Yet, I presume no one would suppose that a law prescribing new qualifications to the right of devising or bequeathing real or personal property, or new regulations as to the manner of doing it, and making the law applicable in terms to all cases where wills had not already taken effect by the death of the testator, would be constitutionally objectionable.

I am of opinion that a will has never been considered, and that it is not by the law of this state, or the law of England, a perfected transaction, so as to create rights which the courts can recognize or enforce, until it has become operative by the death of the testator. As to all such acts which remain thus inchoate, they are in the nature of unexecuted intentions. The author of them may change his mind, or the state may determine that it is inexpedient to allow them to take effect, and require them to be done in another manner. If the law-making power may do this by an act operating upon wills already executed, in this state, it would seem reasonable that a general act, like the statute of wills, contained in the Revised Statutes, would apply itself to all wills thereafter to take effect by the death of the testator in this state, wherever they might be made; and that the law of comity, which has been spoken of, would not operate to give validity

to a will executed in another state, but which had no legal effect there until after the testator, by coming to reside here, had fully subjected himself to our laws; nor then, until his testamentary act had taken effect by his death.

It may be that this conclusion would not, in all cases, conform to the expectations of testators. It is quite possible that a person coming here from another state who had executed his will before his removal, according to the law of his former residence, might rely upon the validity of that act, and would die intestate, contrary to his intention, in consequence of our laws exacting additional formalities with which he was unacquainted. But it may be also that a well-informed man, coming here under the same circumstances, would omit to republish, according to our laws, his will, made at his former domicile, because he had concluded not to give legal effect in this jurisdiction, to the views as to the disposition of his property which he entertained when it was executed. The only practical rule is, that every one must be supposed to know the law under which he lives, and conform his acts to it. This is the rule of law upon all other subjects, and I do not see any reason why it should not be in respect to the execution of wills.

In looking for precedents and juridical opinions upon such a question, we ought, before searching elsewhere, to resort to those of the country from which we derive our legal system, and to those furnished by the courts and jurists of our own country. It is only after we have exhausted these sources of instruction, without success, that we can profitably seek for light in the works of the jurists of the continent of Europe.

The principle adopted by the surrogate is that, as to the formal requirements in the execution of a will, the law of the country where it was in fact signed and attested is to govern, provided the testator was then domiciled in such country, though he may have afterwards changed his domicile, and have been at his death a domiciled resident of a country whose laws required different formalities. Upon an attentive examination of the cases which have been adjudged in the English and American courts, I do not find anything to countenance this doctrine; but much authority, of quite a different tendency. The result of the cases, I think, is, that the jurisdiction in which the instrument was signed and attested, is of no consequence, but that its validity must be determined according to the domicile of the testator at the time of his death. Thus, in Grattan v. Appleton, 3 Story, 755, Fed. Cas. No. 5,707, the alleged testamentary papers were signed in Boston, where the assets were, and the testator died there, but he was domiciled in the British province of New Brunswick. The provincial statute required two attesting witnesses, but the alleged will was unattested. The court declared the papers invalid, Judge Story stating the rule to be firmly established, that the law of the testator's domicile was to govern in relation to his personal property, though the will might have been executed in another state or country where a differ-

ent rule prevailed. The judge referred, approvingly, to Desesbats v. Berquier, 1 Bin. (Pa.) 336, 2 Am. Dec. 448, decided as long ago as 1808. That was the case of a will executed in St. Domingo by a person domiciled there, and sought to be enforced in Pennsylvania, where the effects of the deceased were. It appeared not to have been executed according to the laws of St. Domingo, though it was conceded that it would have been a good will if executed by a citizen of Pennsylvania. The alleged will was held to be invalid. In the opinion delivered by Chief Justice Tilghman, the cases in the English ecclesiastical courts, and the authorities of the writers on the law of nations, were carefully examined. It was declared to be settled, that the succession to the personal estate of an intestate was to be regulated according to the law of the country in which he was a domiciliated inhabitant at the time of his death, and that the same rule prevailed with respect to last wills. I have referred to these cases from respectable courts in the United States, because their judgments are more familiar to the bar than the reports of the spiritual courts in England. But these decisions are fully sustained by a series of well considered judgments of these courts. De Bonneval v. De Bonneval, 1 Curt. 856; Curling v. Thornton, 2 Addams, 6; Stanley v. Bernes, 3 Hag. 373; Countess Ferraris v. Hertford, 3 Curt. 468. It was for a time attempted to qualify the doctrine, in cases where the testator was a British subject who had taken up his residence and actual domicile in a foreign country, by the principle that it was legally impossible for one to abjure the country of his birth, and that therefore such a person could not change his domicile; but the judgment of the High Court of Delegates, in Stanley v. Bernes, finally put the question at rest. In that case an Englishman, domiciled in Portugal and resident in the Portuguese island of Madeira, made a will and four codicils, all of which were executed according to the Portuguese law, except the two last codicils, and they were all executed so as to be valid wills by the law of England, if it governed the case. Letters were granted upon the will and two first codicils, but the other codicils were finally pronounced against. The Reporter's note expresses the result in these words: "If a testator (though a British subject) be domiciled abroad, he must conform, in his testamentary acts to the formalities required by the lex domicilii." See, also, Somerville v. Somerville, 5 Ves. 750, and Price v. Dewhurst, 8 Simmons, 279, in the English Court of Chancery.

It is true that none of these decisions present the case of a change of domicile, after the signing and attesting of a will. They are, notwithstanding, fully in point, if I have taken a correct view of the nature and effect of a will during the lifetime of the testator. But the remarks of judges in deciding the cases, and the understanding of the Reporters clearly show, that it is the domicile of the testator at the time of his death, which is to be considered in seeking for the law which is to determine the validity of the will. Thus, in De Bon-

neval v. De Bonneval, the question was upon the validity of the will executed in England, of a French nobleman who emigrated in 1792, and died in England in 1836. Sir Herbert Jenner states it to have been settled by the case of Stanley v. Bernes, that the law of the place of the domicile, and not the lex loci rei sitæ governed "the distribution of, and succession to, personal property in testacy or intestacy." The Reporter's note is, that the validity of a will "is to be determined by the law of the country where the deceased was domiciled at his death."

Nothing is more clear than that it is the law of the country where the deceased was domiciled at the time of his death, which is to regulate the succession of his personalty in the case of intestacy. Judge Story says, that the universal doctrine, recognized by the common law, is, that the succession to personal property, ab intestato, is governed exclusively by the law of the actual domicile of the intestate at the time of his death. Conf. Laws, § 481. It would be plainly absurd to fix upon any prior domicile in another country. The one which attaches to him at the instant when the devolution of property takes place, is manifestly the only one which can have anything to do with the question. Sir Richard Pepper Arden, Master of the Rolls, declared, in Somerville v. Somerville, that the rule was that the succession to the personal estate of an intestate was to be regulated by the law of the country in which he was domiciled at the time of his death, without any regard whatever to the place of nativity, or the place where his actual death happened, or the local situation of his effects.

Now, if the legal rules which prevail in the country where the deceased was domiciled at his death, are those which are to be resorted to in case of an intestacy, it would seem reasonable that the laws of the same country ought to determine whether in a given case there is an intestacy or not, and such we have seen was the view of Chief Justice Tilghman. Sir Lancelot Shadwell, Vice Chancellor, in Price v. Dewhurst, also expressed the same view. He said: "I apprehend that it is now clearly established by a great variety of cases which it is not necessary to go through in detail, that the rule of law is this: that when a person dies intestate, his personal estate is to be administered according to the law of the country in which he was domiciled at the time of his death, whether he was a British subject or not; and the question whether he died intestate or not must be determined by the law of the same country." The method of arriving at a determination in the present case, according to this rule, is, to compare the evidence of the execution of his will with the requirements of the Revised Statutes. Such a comparison would show that the deceased did not leave a valid will, and consequently that he died intestate.

Being perfectly convinced that according to the principles of the common law, touching the nature of last wills, and according to the result of the cases in England and in this country which have been referred to, the will under consideration cannot be sustained, I have not thought it profitable to spend time in collecting the sense of the for-

eign jurists, many of whose opinions have been referred to and copiously extracted in the able opinion of the learned surrogate, if I had convenient access to the necessary books, which is not the case. I understand it to be conceded that there is a diversity of opinions upon the point under consideration among these writers; but it is said that the authors who assert the doctrine on which I have been insisting, are not those of the highest character, and that their opinions have been criticised with success by M. Felix, himself a systematic writer of reputation on the Conflict of Laws. Judge Story, however, who has wrought in this mine of learning with a degree of intelligence and industry which has excited the admiration of English and American judges, has come to a different conclusion. His language is: "But it may be asked, what will be the effect of a change of domicile after a will or testament is made, of personal or movable property, if it is valid by the law of the place where the party was domiciled when it was made, and not valid by the law of his domicile at the time of his death? The terms in which the general rule is laid down would seem sufficiently to establish the principle that in such a case the will and testament is void; for it is the law of his actual domicile at the time of his death, and not the law of his domicile at the time of his making his will and testament of personal property which is to govern." Story, Confl. Laws, § 473. He then quotes at length the language of John Voet to the same general effect. It must, however, be admitted that the examples put by that author, and quoted by Judge Story, relate to testamentary capacity as determined by age, and to the legal ability of the legatees to take, and not to the form of executing the instrument. And the surrogate has shown, by an extract from the same author, that a will executed in one country according to the solemnities there required, is not to be broken solely by a change of domicile to a place whose laws demand other solemnities. Of the other jurists quoted by the surrogate, several of them lay down rules diametrically opposite to those which confessedly prevail in this country and in England. Thus, Tollier, a writer on the civil law of France, declares that the form of testaments does not depend upon the law of the domicile of the testator, but upon the place where the instrument is in fact executed; and Felix, Malin, and Pothier are quoted as laying down the same principle. But nothing is more clear upon the English and American cases, than that the place of executing the will, if it is different from the testator's domicile, has nothing to do with determining the proper form of executing and attesting. In the case referred to from Story's Reports, the will was executed in Boston, but was held to be invalid because it was not attested as required by a provincial statute of New Brunswick, which was the place of the testator's domicile. If the present appeal was to be determined according to the civil law, I should desire to examine the authorities more fully than I have been able to do; but considering it to depend upon the law as administered in the English and Amer-

can courts, and that according to the judgment of these tribunals it is the law of the domicile of the testator at the time of his death that is to govern, and not that of the place where the paper happened to be signed and attested, where that is different from his domicile at the time of his decease, I cannot doubt that the surrogate and Supreme Court fell into an error in establishing the will.[7]

In re FERGUSSON'S WILL.

(Chancery Division, 1902. 1 Ch. Div. 483, 71 L. J. Ch. 360.)

Francis Edward Montrion Fergusson, of Calcutta, gave a legacy to his niece, Minnie Koppe, of 4 Market street, Hamburg, Germany. The will provided that the legacy should not lapse in the event of the legatee's death in the lifetime of the testator, but should be divided among "the next of kin" of the deceased legatee, and in default of any next of kin should fall into the residue of his estate. The testator died in 1898. Minnie Koppe died in 1897 in Hamburg, a domiciled German subject, without leaving any issue. A claim to the legacy was put forward by the five children of her brother, four nephews and one niece, and by her half-sister, the only daughter of Minnie Koppe's father by his second wife.[8]

BYRNE, J. The question, which has been well and carefully argued, turns upon the true meaning to be placed upon the gift to the "next of kin" of the deceased legatee Minnie Koppe, a domiciled German subject, and arises between her sister of the half-blood, and her nephews and nieces of the whole blood. It appears that the local law of Hamburg did not recognize brothers and sisters of the half-blood as being in the same degree of relationship with brothers and sisters of the whole blood, or even with the more remote nephews and nieces of the whole blood; so that by that law these nephews and nieces would take to the exclusion of the sister of the half-blood (see now the German Civil Code, §§ 1925, 1926, which would seem to have the same effect.—F. P.), whereas by English law the sister of the half-blood would be entitled to the exclusion of the nephews and nieces. It is common ground that this, being the will of a domiciled Englishman, must be governed by the law of England so far as construction is concerned, and I have first of all to determine what is the true construction to be placed on the words "to be divided amongst

[7] Comstock, C. J., and Lott, James, and Hoyt, JJ., concurred in the above opinion. Davies, Selden, and Mason, JJ., dissented.

Accord: In re Beaumont's Estate, 216 Pa. 350, 65 Atl. 799 (1907).

For statutory modification of the rule, see 2 L. R. A. (N. S.) 421–424; English Wills Act 1861 (St. 24 & 25 Vict. c. 114) §§ 1–3; Dicey, Conflict of Laws, 673–678.

[8] This statement of facts has been substituted for that of the original report.

the next of kin of the deceased legatee." According to English law, there being no reference to the statute of distributions, that means to be divided amongst the nearest blood relations, in an ascending and descending line, those of the half-blood being equally entitled with those of the whole blood; but it is argued that I must stop short of that, and say that "next of kin" standing alone means the nearest blood relations of the propositus, and that I must, inasmuch as the legatee was a domiciled German, ascertain who are the nearest blood relations in accordance with German law. In support of this proposition the cases mainly relied on by counsel for the nephews and nieces were Goodman's Trusts, 17 Ch. D. 266, and In re Andros, 24 Ch. D. 637, cases which establish that where there is a gift of personalty to the "children" of a named person who is a foreigner, not only those children will take who by English law would be entitled as "children," but the gift must be construed as meaning all those children whose legitimacy is established by the law of their parent's domicile; in other words, you construe the will containing a gift of personalty to children of a foreigner according to English law, but in ascertaining who are the children entitled you have regard to the status of the parent, so that ante nati made legitimate by the subsequent marriage of their parents, in countries where a subsequent marriage renders these children legitimate, are recognized as legitimate under English law, and can take under this gift. That results from the rules followed by the comity of nations which we call international law. Now, it is said here that, this being a gift in an English will to the next of kin of a German lady, it is a question of status who are the next of kin; in my opinion, that is not the true view of the law. It appears to me I must construe the will first, and I find the gift means a gift to the legatee's nearest blood relations; it may well be that, in consequence of the legatee being a German, different persons may be entitled from those who would have taken had she been an English woman, as, for instance, suppose she had left children legitimate according to German law, but illegitimate according to English law, these children would take precedence, and would thus oust a sister or a brother who would otherwise have been the persons entitled according to English law, and then the question of status would come in; but that is a different thing from what Mr. Jessel asks me to do here, namely, to put an interpretation upon the words used by this testator which shall entirely exclude the English construction of those words. I have the words "next of kin" in an English will. I ask myself, what do they mean? The answer is they mean nearest blood relations in the ascending and descending line, including those of the half-blood, and I see no authority in any of the cases which have been cited to me for saying that I ought to construe these words as meaning next of kin according to the German law. In my opinion, the next of kin, are to be ascertained according to English law, subject, as I have already indicated, to the question of status, should any question of that

kind arise. The result in the present case is, that I hold that the sister of the half-blood is entitled to this legacy to the exclusion of the nephews and nieces.[9]

STAIGG v. ATKINSON.

(Supreme Judicial Court of Massachusetts, 1887. 144 Mass. 564, 12 N. E. 354.)

HOLMES, J.[10] This is an action brought by a widow to recover one-third of the proceeds of land in Minnesota, formerly belonging to her husband, and sold without prejudice. The defense is that she is barred by having accepted the provisions of her husband's will. The husband made a will while domiciled in Rhode Island, providing for the plaintiff, but not declaring the provision to be in lieu of dower, and then changed his domicile to Massachusetts, where he died. If he had died domiciled in Rhode Island, and the land had been situated there, the provisions of the will would not have prevented the plaintiff from recovering dower; and it has been decided, in a case between the same parties, that the change of domicile did not affect her right in Rhode Island land. Atkinson v. Staigg, 13 R. I. 725. If he had been domiciled and had made his will in Minnesota, the plaintiff would have been entitled by statute to the one-third which she claims; and, as there is no statute to the contrary, the provisions of the will would not have put her to an election. Gen. Laws Minn. 1875, c. 40; In re Gotzian, 34 Minn. 159, 163, 164, 24 N. W. 920, 57 Am. Rep. 43; Reed v. Dickerman, 12 Pick. 146, 149; Ellis v. Lewis, 3 Hare, 310. If, finally, the land had been situated in Massachusetts, and the will executed there, the plaintiff would have been compelled to elect be-

[9] Accord: In re Riesenberg's Estate, 90 S. W. 1170 (1905).

The law of the last domicile of the testator will govern the interpretation of a will of personal property, unless the testator had in mind the law of another state. Harrison v. Nixon, 9 Pet. 483, 9 L. Ed. 201 (1835). See, also, Caulfield v. Sullivan, 85 N. Y. 153 (1881). But it has been said that, where the domicile has been changed since the making of the will, the law of the domicile at the time of its execution should govern the interpretation of the will. Atkinson v. Staigg, 13 R. I. 725 (1882), semble; Holmes v. Holmes, 1 Russ. & M. 660 (1830). See, also, English Wills Act, 1861 (St. 24 & 25 Vict. c. 114) § 3. The law of the last domicile will determine, also, in general, the effect and operation of the will of personal property—e. g. whether a bequest is absolute or upon trust. McCurdy v. McCallum, 186 Mass. 464, 72 N. E. 75 (1904). So whether an active or passive trust has been created. Rosenbaum v. Garrett, 57 N. J. Eq. 186, 41 Atl. 252 (1898). So whether a legacy will lapse by reason of the prior death of the legatee. Anstruther v. Chalmer, 2 Sim. 1 (1825); Lowndes v. Cooch, 87 Md. 478, 39 Atl. 1045, 40 L. R. A. 380 (1898). So whether the personalty has been equitably converted into realty. McPherson v. Stewart, 28 L. J. Ch. 177 (1858). So as to what will pass under the term "movables." Enohin v. Wylie, 10 H. L. Cas. 1 (1862). Or under the residuary clause of a will. Proctor v. Clark, 154 Mass. 45, 27 N. E. 673, 12 L. R. A. 721 (1891).

[10] The statement of facts has been omitted.

tween her dower and the will. Pub. St. c. 127, § 20; St. 1861, c. 164, § 1. So far there is no dispute between the parties.

On the foregoing statement, it is obvious that the defendant cannot prevail, unless the rule which would govern if the land lay here also governs the present case. It is contended that that rule does govern, on the ground that the Massachusetts statute is a statute of construction, reading a clause of universal application into the will, to the effect that the provision made for the widow is in lieu of dower, or substituted statutory interests in all lands, wherever situated; that the will is to be construed by the law of the domicile of the testator at the time of his death, and that if the will, so construed, makes an acceptance of its provisions a waiver of dower, etc., the law of Minnesota would enforce the election made by such acceptance. Washburn v. Van Steenwyk, 32 Minn. 336, 20 N. W. 324.

But we cannot admit that a rule of construction, properly so called, not known to the law of the party's domicile when he made his will, is necessarily to be imported into it by reason of his dying domiciled elsewhere. For purposes of construction it is always legitimate to consider the time when and the circumstances in which the will was made, and we think the law under which it was made was one of those circumstances. We are speaking only with reference to a case like the one before us, not to a question like that in Harrison v. Nixon, 9 Pet. 483, 504, 9 L. Ed. 201. The testator was at liberty to make his gift to his wife in lieu of or in addition to dower, as he saw fit. Which it should be, he had to consider, if he ever considered it, when he drew his will. He drew his will under a system by which the gift was in addition to dower unless he expressed the contrary, and he did not express the contrary. We are at a loss to see why his words should be held to acquire a new meaning upon his moving into a state where testamentary gifts are in lieu of dower unless shown to be in addition to it. Atkinson v. Staigg, ubi supra; Holmes v. Holmes, 1 Russ. & M. 660.

In view of our construction of the Massachusetts statute, it is not necessary to consider what was the effect of moving into Massachusetts with regard to Massachusetts land. The plaintiff has never made any claim upon it. See Shannon v. White, 109 Mass. 146. Neither need we pass upon the plaintiff's argument that the general laws of Minnesota should be accepted here as determining the construction of the will, so far as concerns the effect of accepting its provisions upon the plaintiff's right to Minnesota land. It would follow from that argument that the plaintiff would have been barred of her dower in the Massachusetts land even if the testator had not moved from Rhode Island.

The case of Jennings v. Jennings, 21 Ohio St. 56, relied on by both sides, was the case of a West Virginia will giving the wife certain interests in land in Ohio, and it was intimated that with regard to Ohio lands she was put to her election between the will and her dower,

although West Virginia preserved the common-law rule allowing her to claim dower in addition to what was given by the will. We understand this case to go on the ground that the law of the place of the land given to the widow by the will was to determine whether she was put to an election or not, at least with regard to land in the same jurisdiction, claimed outside the will. Thus construed, the case helps neither party. The case of Washburn v. Van Steenwyk, 32 Minn. 336, 20 N. W. 324, which was put in evidence, is opposed to the plaintiff's contention. See Van Steenwyck v. Washburn, 59 Wis. 483, 510, 17 N. W. 289, 48 Am. Rep. 532.

But we need not pursue this branch of the case further, because, in our opinion, the Massachusetts statute does not purport to affect lands outside of the state either by way of construction or otherwise. The language of Pub. St. c. 127, § 20, is as follows: "A widow shall not be entitled to her dower in addition to the provisions of her deceased husband's will, unless such plainly appears by the will to have been the intention of the testator." In St. 1861, c. 164, § 1, the language is: "If she makes no such waiver, she shall not be endowed of his lands, unless it plainly appears by the will to have been the intention of the testator that she should have such provisions in addition to her dower." Both of these acts in form are directed at dower, not at the construction of wills. The statutes give the widow dower (Pub. St. c. 124, § 3; Rev. St. c. 60, § 1), and allow her six months in which to waive the provisions made for her by will (Pub. St. c. 127, § 18; St. 1861, c. 164, § 1; Rev. St. c. 60, § 11). They then go on to say that she cannot have her dower unless she waives the will, but add that the husband may make his bounty an addition to her dower if he sees fit. No doubt the statute was intended to change the common-law rule. But the fact that it approaches the subject from the side of dower, and not from the side of the will, shows that it was only intended to operate with regard to Massachusetts lands, whether described as a statute of construction or as a statute relating to dower. Of course, Massachusetts would not attempt to legislate concerning dower in another state. Taking the view which we have expressed, we have not considered whether the statutory one-third in fee given by the law of Minnesota would be included under the word "dower" in our statute.

It was suggested for the defendant that the widow could not claim under the will in one jurisdiction, and against it in another. But, on our construction of the will and the Massachusetts statute, she does not claim against the will by claiming her third of the Minnesota land outside of it.

We are of opinion that the plaintiff's interest is bound to contribute to the payment of debts secured by mortgage upon the Massachusetts lands. By the old law, until changed in England by St. 17 & 18 Vict. c. 113, if other land was charged with the payment of debts, it had to exonerate land which the testator had mortgaged. And this rule

was not based upon the fact that the devise of the mortgaged land was specific, as it would have been even if residuary, or upon any notion of the intention to be drawn from the will. Undoubtedly, land not passing by the will, but acquired and mortgaged after the will was drawn, would have been exonerated. The rule was put upon the ground that the debt was a general debt, like any other, and the mortgaged land only a security, and therefore that the funds liable for general debts must pay it. Bartholomew v. May, 1 Atk. 487; Tweedale v. Coventry, 1 Brown, Ch. 240; Serle v. St. Eloy, 2 P. Wms. 386; Hewes v. Dehon, 3 Gray, 205, 207; Plimpton v. Fuller, 11 Allen, 139. It followed that, when other land and the mortgaged land were both charged together, they were held to contribute ratably (Carter v. Barnadiston, 1 P. Wms. 505; Middleton v. Middleton, 15 Beav. 450; Harper v. Munday, 7 De Gex, M. & G. 369); and the same principle would apply when all the lands are charged by statute, instead of by will.

By the Minnesota statute, the plaintiff's interest is "subject, in its just proportion, with the other real estate, to the payment of such debts of the deceased as are not paid from the personal estate"; so that, apart from the will, the plaintiff's one-third would stand no better than the other two-thirds. Taking into account this and the general course of legislation which makes land liable for debts, we think that it would be too artificial to interpret the testator's general direction to pay debts as indicating an intent to charge the interests passing by the will in exoneration of the plaintiff's one-third, even as against residuary devisees. Hewes v. Dehon, ubi supra. See Harris v. Watkins, Kay, 438. Although we assume that the residuary devise was not specific, so far as it affected the Minnesota land, as it was not with regard to the land in Massachusetts (Blaney v. Blaney, 1 Cush. 107; Thayer v. Wellington, 9 Allen, 283, 296, 85 Am. Dec. 753), the plaintiff prevails upon a somewhat technical principle, and hardly can complain if she is held to stand upon the footing on which the Minnesota statute meant to put her.

Judgment for plaintiff for $2,205.69.[11]

PEET v. PEET.

(Supreme Court of Illinois. 1907. 229 Ill. 341, 82 N. E. 376, 13 L. R. A. [N. S.] 780.)

VICKERS, J.[12] Section 10 of chapter 39, Hurd's Rev. St. 1905, provides as follows: "If, after making a last will and testament, a child

[11] In favor of the lex domicilii of the testator, see, also, Bolling v. Bolling, 88 Va. 524, 14 S. E. 67 (1891).

[12] The statement of facts has been omitted. Only so much of the opinion is given as relates to the discussion of the law governing the construction of the will. Cartwright, Farmer, and Dunn, JJ., dissented.

shall be born to any testator, and no provision be made in such will for such child, the will shall not on that account be revoked; but unless it shall appear by such will that it was the intention of the testator to disinherit such child, the devises and legacies by such will granted and given, shall be abated in equal proportions to raise a portion for such child equal to that which such child would have been entitled to receive out of the estate of such testator if he had died intestate, and a marriage shall be deemed a revocation of a prior will."

The sole question for determination in this case is whether the devise under the will should be abated to raise a portion for appellant equal to that which he would have been entitled to receive had the testator died intestate. Appellant's contention may be reduced to two principal propositions: First, whether the testator intended by his will to disinherit his after-born child must be determined by the laws of the state of New York, where the testator was domiciled; second, under section 10 of chapter 39 of our statutes, above set out, no evidence outside of the will itself is admissible, and under said section and the words of the will appellant is entitled to a one-fourth interest in the real estate involved. If either of the foregoing propositions is sustained, then that the decree below is erroneous would seem to follow as a necessary conclusion. We will consider these two propositions in the order in which they are stated.

First. Appellant concedes that the devolution of real property is governed by the law of the place where the real estate is situated, but he insists that in determining the testator's intention the law of New York must govern. To say that the intention of the testator must be determined under the laws of his domicile is equivalent to saying that the construction of a will is governed by the laws of the testator's domicile. There is no perceivable difference between the construction of a will and determining the intention of the testator, unless it may be said that ascertaining the intention of the testator is the object to be sought, and construction is the means of attaining that object. Whatever may be the rule with respect to movable property, we regard the law as firmly established in this state that all instruments affecting the title of real estate situated in this state must be governed, as to their execution, construction, and legal sufficiency, exclusively by the laws of Illinois, and not by the laws of a foreign country or sister state wherein the maker may reside at the time of their execution.

In Redfield on Wills (volume 1, p. 398), it is said: "It is scarcely necessary to state that in regard to real property the mode of execution, the construction, and the validity of a will must be governed exclusively by the lex rei sitæ. The descent of real estate, as well as the devise of it, is governed exclusively by the law of the place where the property is situated. It would not comport with the dignity, the independence, or the security of any independent state or nation that these incidents should be liable to be affected, in any manner, by the legislation or the decisions of the courts of any state or nation besides

itself. This has been a universally recognized rule of the English law from the earliest time, and is so unquestionable that we should scarcely feel justified in occupying much space in reviewing the cases." In City Ins. Co. v. Commercial Bank, 68 Ill. 348, this court, on page 353, said: "Mr. Story concedes that the courts of England and the United States have arrived at opposite conclusions as to the effect of statutable transfers of movable property under the bankrupt or insolvent laws of the debtor's domicile, but he adds: 'All the authorities in both countries, so far as they go, recognize the principle, to its fullest extent, that real estate or immovable property is exclusively subject to the laws of the government within whose territory it is situated. Indeed, so firmly is this principle established that in cases of bankruptcy the real estate of the bankrupt situated in foreign countries is universally admitted not to pass under the assignment, although, as we have seen, there is great diversity of opinion as to movables.' Story on Conflict of Laws, § 428." See, also, West v. Fitz, 109 Ill. 425. In Wunderle v. Wunderle, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84, this court, on page 53 of 144 Ill., page 197 of 33 N. E. (19 L. R. A. 84), said: "It is a general rule of the common law that the title to real property must be acquired and passed according to the lex rei sitæ. This rule not only applies to alienations and acquisitions made by the acts of the parties, but also to estates and rights acquired by operation of law. The descent and heirship of real estate are governed by the law of the country where it is located. Story on Conflict of Laws, §§ 424, 448, 483, 509; Stoltz v. Doering, 112 Ill. 234. This principle, originally applicable as between countries entirely foreign to each other, also prevails as among the states of the American Union." In Harrison v. Weatherby, 180 Ill. 418, 54 N. E. 237, this court had before it a will executed in the state of North Carolina by Richard Smith. There were no witnesses to the will, and apparently the laws of North Carolina recognized the validity of holographic wills without attestation. The will, on its face, showed that it had been written by the testator in person, and attestation by witnesses was dispensed with because the law of that state recognized the validity of a will proven to be in the handwriting of the testator. The will affected the title to a large body of real estate in Illinois. In the course of the opinion in that case, on page 435 of 180 Ill., page 239 of 54 N. E., the following rule was laid down by this court: "The validity and construction, as well as the force and effect, of all instruments affecting the title to land, depend upon the law of the state where the land is situated. This rule includes wills, as well as deeds, contracts, or agreements; and it includes the form and mode of the execution of the will as well as the power of the testator to make the devise or disposition of property contained in the will. West v. Fitz, 109 Ill. 425; McCartney v. Osburn, 118 Ill. 403, 9 N. E. 210; City Ins. Co. of Providence v. Commercial Bank of Bristol, 68 Ill. 348; Wunderle v. Wunderle, 144 Ill. 40, 33 N. E. 195,

19 L. R. A. 84; Ford v. Ford, 70 Wis. 44, 33 N. W. 188, 5 Am. St. Rep. 117; Robertson v. Pickrell, 109 U. S. 608, 3 Sup. Ct. 407, 27 L. Ed. 1049; McCormick v. Sullivant, 10 Wheat. 192, 6 L. Ed. 300; Darby v. Mayer, 10 Wheat. 465, 6 L. Ed. 367." It will be noted that in the cases above cited the construction of instruments affecting real estate, as well as their force and validity, is governed exclusively by the lex rei sitæ. Judicial construction is the process of applying natural methods of finding and weighing evidence to discover the fact of intention. To say that the intention of a maker of an instrument is to be determined by one law or set of rules, and that its construction is to be by another and different law or set of rules, is contradictory and absurd.

The only authorities in this state that appellant cites in support of his contention are Carpenter v. Browning, 98 Ill. 282, and Freund v. Freund, 218 Ill. 189, 75 N. E. 925, 109 Am. St. Rep. 283. Neither of these cases is in point. In the Browning Case the question presented was as to the effect of the married woman's act of 1861 upon a devise in trust for the use of a married woman, made prior to the act of 1861. In that case, after the act of 1861 was passed, the usee sought to compel the execution of the trust by compelling a conveyance to be made by the trustee to the beneficiary. It was held that the married woman's act of 1861 did not execute the trust nor entitle the beneficiary to a conveyance where the will imposed active duties on the trustee. In disposing of that case the court held that the state of the law at the time of the execution of the will might be referred to for the purpose of arriving at the intention of the testator, and that the rights of the parties were to be determined under the law as it existed at the time of the testator's death. The case lends no support to appellant's contention that a law of a foreign country or sister state should govern this court in the construction to be given to the will now under consideration. Freund v. Freund involved the right of the insured, under a New York life insurance policy, to change the beneficiary without the consent of the company properly indorsed on the policy. Under the statute of New York a beneficiary could not be changed except by written indorsement upon the policy by the company. It was held that the assured was bound by the statute of New York. That case has no application whatever to the facts of the case in hand. The case does not relate to real estate or other property located in this state. The contract of insurance was executed in the state of New York, and, so far as the case shows, was to be wholly performed there, and, of course, was made and accepted in view of the statute relating to a change of beneficiaries.

The authorities relied on by appellant outside this state, so far as we have been able to examine them, seem to be referable rather to the doctrine, recognized in this state as well as in those jurisdictions wherein the cases are found, that in determining the true intent and meaning of a will the court will have recourse to the circumstances of the

testator and of his family and affairs, and of other facts which it can be shown will in any way aid the court in the right interpretation of a testator's will. Proposition 5 of Wigram's Rules, p. 142, Wigram on Wills. Under this rule we have no doubt that if a will executed in a foreign country contains words or phrases which have a local or domiciliary meaning different from the meaning of the same words or phrases in this state, with which the testator is shown or presumed to have been acquainted, extrinsic evidence of such domiciliary meaning may be heard to enable the court to read the will with the same light under which it was written. In this view it can make no difference how such domiciliary meaning was established. It may be by the usage or custom of merchants or traders in the place where the instrument was executed, or may be a meaning established by statute or judicial decision. But, however established, the usage or law, and the meaning of the words thereunder, are proven, not to establish a rule of law binding on the court charged with the proper interpretation of the will, but simply as a fact or circumstance proven to enable the court to arrive at a correct construction under the laws of the forum.

It is a well-established rule that parol evidence may be received of a usage or custom to explain the meaning of terms used in a written contract that would otherwise be ambiguous. Indeed, under the more recent authorities the rule seems to be established that such evidence is admissible to explain the meaning of, but not to contradict, the instrument, even though no ambiguity exists on the face of the instrument. 1 Elliott on Evidence, § 607, and cases there cited. See, also, 2 Page on Contracts, § 1108, and citations there made. As applied to the construction of instruments affecting the title to real estate, the above rule furnishes the only ground upon which a court of this state is warranted in hearing evidence as to the law of the state or government of the maker's domicile, and when, under these limitations and restrictions, it is heard, it is only to be considered as an extrinsic fact brought forward by extrinsic evidence to enable the court to properly interpret the true intention of the testator. While the language selected by courts and law writers in applying this rule has not always been entirely clear, yet, when the authorities are carefully considered and analyzed in the light of the facts involved, we do not believe a well-considered case can be found which holds that the law of the domicile of the maker of an instrument affecting the title of real estate, respecting the construction thereof, is binding on a court where the real estate is situated, when called on to construe and enforce such instrument. Our conclusion as to appellant's first proposition is that it cannot be sustained, and that the will is to be construed—that is, the intention of the testator must be determined—by the law of this state. * * *[13]

[13] See, also, Minor, Conflict of Laws, § 145; Crawford D. Hening, Construction of Wills Devising Real Estate. 50 Am. L. Reg. 623–638, 718–733.

WESTERMAN v. SCHWAB.

(Court of Session, 1905. 8 Sess. Cas. [5th Series] 132.)

This was an action of multiple poinding raised in the Sheriff Court at Aberdeen at the instance of Thomas Collette Westerman, executor dative of the deceased Mrs. Sarah Ann Scott or Westerman, wife of the deceased Edward Westerman, soap manufacturer, Aberdeen.

On 4th June, 1897, Mrs. Westerman, then Miss Scott, executed a will in English form disposing of her whole estate. At that date and down to the date of her marriage with Mr. Westerman she was domiciled in England. Some years after the execution of the will she was married in England to Mr. Westerman, who was then, and continued to be till his death, domiciled in Scotland.

Mrs. Westerman died at Aberdeen on 25th March, 1904, survived by her husband, who died on 27th April, 1904, without having expede confirmation of her estate. The pursuer, who was a son of Mr. Westerman by a prior marriage, gave up an inventory of the estate of Mrs. Westerman, and was duly confirmed executor dative to her qua representative of her husband. The estate left by Mrs. Westerman consisted of movable estate.

One half of the free residue of the estate was paid by the executor to the representatives of Mrs. Westerman's husband in respect of jus relicti. The other half of the free residue formed the fund in medio in this action.

A claim was lodged by Frederick L. P. Schwab and others, the executor and legatees under Mrs. Westerman's will. They claimed the whole fund in medio in virtue of the will.

A claim was also lodged by George Worth and others, Mrs. Westerman's next of kin. These claimants averred that the will executed by Mrs. Westerman on 4th June, 1897, was, according to the law of England, revoked by her subsequent marriage. [The Wills Act, 1837 (1 Vict. c. 26), enacts as follows: "Sec. 18. And be it further enacted that every will made by a man or woman shall be revoked by his or her marriage. * * * Sec. 35. And be it further enacted that this act shall not extend to Scotland."] And that she executed no will subsequent to her marriage.

The claimants Schwab and others pleaded: (2) Mrs. Sarah Ann Scott or Westerman becoming by her marriage a Scotswoman, her will was not revoked by her marriage, but remained valid and effectual.

The claimants Worth and others pleaded: (1) The will founded on having been executed before the marriage of the said Sarah Ann Scott or Westerman, who continued domiciled in England down to the date of her marriage, was by her marriage revoked.

By an interlocutor, dated 28th December, 1904, the sheriff substitute (Robertson) found that the will executed by Mrs. Westerman on 4th June, 1897, remained valid and effectual notwithstanding her sub-

sequent marriage, and therefore ranked and preferred the claimants Schwab and others in terms of their claim.

The claimants Worth and others appealed to the sheriff. By interlocutor dated 11th February, 1905, the sheriff (Crawford) recalled the sheriff substitute's interlocutor, found that the will executed by Mrs. Westerman on 4th June, 1897, was revoked by her subsequent marriage, and therefore ranked and preferred the claimants Worth and others in terms of their claim.

The claimants Schwab and others appealed to the Court of Session.

LORD PRESIDENT.[14] Miss Scott was a domiciled Englishwoman, and she executed a will—properly executed it according to the law of England—by which she disposed of her whole estate. Some years thereafter she married Mr. Westerman, of Aberdeen, a domiciled Scotsman. Some years after that she died, having continued to live with her husband in Scotland. She left no will behind her except the will which she had made while she was a spinster. Her husband claimed and has received one-half of her movable estate in respect of his jus relicti; and a competition has arisen as to the other half, the competitors being the executors under her will which I have referred to, and her next of kin, the latter claiming upon the assumption that she died intestate.

The argument for intestacy turns entirely upon the fact that, by the eighteenth section of the Wills Act, 1837, it is enacted that every will made by a man or woman shall be revoked by his or her marriage. It is admitted by the parties that the Wills Act does not apply to Scotland; but it is contended on the one side that, being an Englishwoman, the moment she married her will was cut down, whereas, on the other side, it is maintained that the moment she married she became a Scotswoman, and that, therefore, the Wills Act had no effect, and the will was not cut down. The sheriff substitute and the sheriff have taken different views upon the matter. The point is a novel one, as to which I do not think that in this country, at any rate, there is any authority. The sheriff substitute held that the will was good. His view is very well expressed. He says: "It is the law of the testatrix's domicile at the time of her death that determines the validity of the will; the testatrix died a Scotswoman, and by the law of Scotland a will valid when made according to the law of the testator's then domicile remains in force, notwithstanding a subsequent marriage, unless, of course, revoked. No doubt, if the testatrix here had married an Englishman the will would have been ipso facto revoked as if it had never been, and could not have been resuscitated even though she afterwards acquired a Scotch domicile. But the case here is different. The act that would otherwise have revoked the will exempted the testatrix from the provisions of the revoking statute." The sheriff, on the other hand, while agreeing with much that the sheriff substi-

[14] The Lord Dunedin.

tute says, states this, and this is the keynote of his judgment: "All three things are simultaneous, and occur at the same moment—the marriage and its two results—the revocation of the will and the change of domicile. The important point is that the two results are strictly simultaneous with each other. The same stroke which cuts off the English domicile cuts off the will. It is impossible to say that the testratrix had acquired a Scottish domicile before the event which revoked the will. For these reasons, I am of opinion that the will was revoked, and that the claimants under it cannot succeed."

In these circumstances it cannot but be said that the question is one of nicety. If I may venture a criticism upon the learned sheriff's judgment it would be this, that I do not think the case can be well disposed of upon what I may call metaphysical considerations as to the precise moment of time at which these things happened.

I think the way to dispose of the case is to begin at the beginning of the elementary principles that govern such matters. The first question undoubtedly is this: What is the domicile of the alleged testatrix at the time when she died? There is no doubt about that, everybody agrees that she died Scottish. Therefore you have first the undoubted proposition that it is the law of Scotland that will regulate the distribution of the effects which she left behind her; and indeed it is conceded not only in argument at the bar, but it is conceded de facto by what has happened, because of course, it is under the law of Scotland that one-half of her movable estate has been given to her surviving husband in the name of jus relicti, which is a purely Scottish right. But, further, the law of Scotland goes on to say that the half which is not affected by the jus relicti, the half which is the dead's part, shall be carried by a will if she left one; and accordingly it is the law of Scotland which will first of all decide whether she did leave a will, or whether she did not. A certain document is produced which, upon the face of it, bears to be a will; and here the law of Scotland, although completely keeping to itself the right of pronouncing whether anything is a will or is not, will often have to have recourse to other systems of law in order to know whether a particular document is or is not a will. Take the case that the will in question was a will which undoubtedly was badly executed according to the law of Scotland, but of which it was alleged that it was quite properly executed according to the law of the country where the person was domiciled at the time that he executed it. The law of Scotland will always go to that system of law and will inquire: "Is this will well executed according to the forms of that other country, or is it not?" If the answer is in the affirmative, then it will give effect to it according to the law of that country. We had a very excellent argument upon both sides of the bar, but I cannot go the whole length that Mr. Brown wished us to go in the second portion of his speech, when he urged that the moment we say that this lady was a domiciled Scotchwoman, then the question ended. The question does not end, because, once you have to go to another

system to find out whether this is a will or not, you have got, of course, to take the history of the document. I am assuming you are answered at once, that, according to the English law, the will was well executed; but then it would be pointed out that although it is well executed, it was put out of existence by something else happening, and we are bound to look into that. Now, what is that something? That something is the fact of the marriage, and accordingly, it seems to me that we are bound to consider as the next question, what was the state of the law which arose upon the marriage? By what law is that to be determined?

It seems to me that the real principle is that when you come to consider the effect of the marriage upon the patrimonial rights of the persons who were married, you must, apart of course from the questions of special contract, always consider that according to the law of the domicile of the married persons, and the law of the domicile of married persons is the law of the domicile of the husband.

I am confirmed in this view, because I think it is directly in accordance with the view that was taken by the Master of the Rolls, now Lord Lindley, in a case which does not seem to have been cited before either of the learned sheriffs, Loustalan v. Loustalan, L. R. (1900) 211. The judgment itself does not touch this case, and there was so much difference of opinion among the learned judges who disposed of the case upon the precise import of the facts, that one has to look at the case with considerable care, in order to extract from it what was really laid down in it. The question was, whether a will made by an unmarried Frenchwoman was or was not revoked by her subsequent marriage. The lady in question was undoubtedly French in origin. She came over to England and entered domestic service with an English family. While she was in England she made a will. It was not executed according to the law of England; it was executed according to the law of France. About four years after that she left domestic service and established a laundry business in London. In the same year she married a French refugee, who was flying from France at that time in order to escape from a prosecution for some offence which he had committed. Indeed, he had been sentenced in absence to ten years' imprisonment. The parties lived together for some time in England, and then, the ten years having run out, the husband seemed to have thought it safe to go back to France again, which he then did. He and his wife parted company, she remaining in England and he going to France. In that state of matters she died, leaving no will behind her except the old will which she had made as a spinster. The point in that case, as in this, was simply whether that will had been revoked by her marriage. The case was first disposed of by the late President of the Probate Division, Lord St. Helier, and it subsequently went to the Court of Appeal, composed of Lord Lindley, Master of the Rolls, and Lords Justices Rigby and Vaughan Williams. The learned Lords took very different views upon the

facts. The President held that at the date of her death her domicile was in France, because, in his opinion, her husband was domiciled in France at her death, but he held that when they married, at the moment of marriage, they intended that the matrimonial régime should be in England; and upon that he came to certain conclusions. The Master of the Rolls did not take that view at all. He thought that the domicile of both parties was French all along, that is to say, he thought that she had not lost her French domicile when she married, and that he did not lose his French domicile when he married her, in respect that he went back to France; and accordingly she was French from beginning to end. The other two Lord Justices, on the other hand, thought that the husband's domicile at the time of the marriage was English, and upon that view they held that the will was not good. But I am bound to state that I do not think they put their judgment nearly so much upon the operation of the marriage, in respect of the Wills Act, as they did upon this, that if the husband was a domiciled Englishman at that time, which was before some of the recent Married Women's Property Acts, the result was simply to transfer the lady's whole estate to the husband, and that consequently it was not so much a question of whether the will was good or not, as a question of there being nothing for the will to operate upon. I think Mr. Watson's observation was well founded; that although the case looks, upon the mere reading of the rubric, to be an authority against him, it is not really an authority upon this point, and I agree with him.

There are certain observations of both Lord Justice Rigby and Lord Justice Vaughan Williams to the effect that this 18th section of the Wills Act is part of the matrimonial and not of the testamentary law with which I find it difficult to agree. I am not sure that I quite understand what they mean by that, because I cannot see that you can divide the law into chapters, and say that such a thing belongs to one portion of the law and not to another. Of course, in many cases, it may be convenient to do so for purposes of discussion or reference, but I do not see how the effect of a thing can depend upon that division into chapters. What I take from the Case of Loustalan, L. R. (1900) 211, accordingly, is not the decision, but rather certain observations of Lord Lindley, which, I think, are absolutely in point in the view of the law which I am suggesting, although as a matter of fact, they did not receive application in that case owing to the view of the facts that Lord Lindley took.

Now, Lord Lindley begins, just as I have ventured to begin, by saying you must first of all begin at the death of the alleged testatrix, and find what the domicile then was. He held that her domicile at her death was French; but he goes on to say: "The validity of a will of movables made by a person domiciled in a foreign country, at the time of such person's death, not only may, but must, depend on the

view its Courts take of the validity of the will when made." Here it is agreed that the will was valid when made. But then he goes on to say, not only that it depends on the validity of the will when made, but on its subsequent revocation if that question arises. "These questions," he says, "may or may not turn on the domicile of the testator as understood in this country," and then he goes on to state the facts, and says—"By whatever court this question is to be decided, the English law of marriage, which in such a case involves, and indeed turns on English views of domicile, must be considered. If this view be ignored, the effect of the marriage will be inadequately, and indeed erroneously, ascertained. If the domicile of the testratrix is to be treated as English, when she became a married woman her will was revoked by her marriage, for such is the law of England whatever the intentions of parties may be; but if her domicile was French, her will would not be revoked by English law, and still less by French law. Both laws are alike in regarding her domicile as that of her husband as soon as she married him. The effect of her marriage must, therefore, depend upon the English view of his domicile." That is exactly what I have suggested to your Lordships. Further on, in a later portion of his judgment, his view is made perfectly clear, if your Lordships keep in mind what I have said upon the facts of the case, because at page 233 the learned Lord says this: "The domicile of the testratrix being French when she made her will and when she died, it became necessary to ascertain the effect of her will on her movable property according to French law. The husband being, in my opinion, domiciled in France when she married, it became necessary to ascertain the effect of such marriage by French law upon her will; and if, in order to ascertain this, it became necessary for the French experts to be told what the English law was, they should have been told that it depended on the view which an English court would take of the domicile, in the English sense, of the husband; and if I am right in my view of his domicile, the experts should have been told that by English law the marriage in this case did not revoke the wife's will."

Your Lordships will notice that I have emphasised the fact that he always speaks of the husband and his domicile. He excludes altogether the consideration of what was the domicile of the wife. He says it is quite enough if you settle one way or another what was the domicile of her husband at the time of the marriage, because the moment you do that you settle what her domicile is; and then if you settle what the domicile of the parties at the time of the marriage is, you at once settle the law according to which the proprietary effects of the marriage are to be judged—either French law if he is a domiciled Frenchman, or English law if he is a domiciled Englishman. And, accordingly, he further goes on to say: "It was not necessary, or, indeed, proper on this occasion to pursue the inquiry further, and to see

what matrimonial régime the parties intended to adopt. It was not necessary to cite authorities to shew that it is now settled that according to international law, as understood and administered in England, the effect of marriage on the movable property of spouses depends (in the absence of any contract) on the domicile of the husband in the English sense. * * * This being clear, the will was not revoked." That would be a non sequitur unless the whole point depended upon the domicile of the husband at the time of the marriage.

Accordingly, I think that, carefully looked into, it will be found that I certainly have the great authority of Lord Lindley for the proposition that I am putting, that when you come to consider what the effect of the marriage is upon the will, which you have already started with as being properly executed, you must consider that in the light of the law of the domicile of the married persons at the date of the marriage, and the law of the domicile of the married persons is the law of the domicile of the husband. Here the domicile of the husband at the date of the marriage was Scottish, and, therefore, you have to consider the effect of the marriage upon the will in the light of the Scottish law, and not of the English. That being so, there is no question whatsoever that by the Scottish law the will of this spinster, being valid before her marriage, was not revoked, and, accordingly, I think the will stands.

That disposes of the case; but I ought to mention a very ingenious argument Mr. Watson pressed upon us, which was this, that the effect of the English Wills Act was really, so to speak, to read a clause into every English person's will to the effect that his will shall be revoked on marriage. He cited authorities in which certain expressions were used that are consistent with that view. I am not in any way controverting the authority of these cases, because they do not touch the point at all. It would be quite a convenient way of speaking, to say that every will has got that read into it; but if you are to press that form of expression to more than a convenient way of speaking, then I do not agree. I do not think we need go further on this point than to cite the Case of Loustalan, L. R. (1900) 211, where the court held the will was revoked. The lady in that case married a person whom the court held to be a domiciled Englishman. Of course it does not matter whether the facts were rightly or wrongly decided. The husband in that case was a domiciled Englishman according to the majority of the court, and that revoked the will. That could only be by the operation of the act at the time of the marriage, because it is evidently absurd to suppose that that French spinster's will had ingrafted into it a condition that revoked it upon marriage, because everybody agrees that, at the time she made the will, the will was a French document, and not an English document. Accordingly, I think that shews that what Mr. Watson says is no more than a convenient form of expression, and does not really go to the root of the matter.

On the whole matter I am of opinion that we should recall the judgment of the sheriff, and revert to the judgment of the sheriff substitute.[15]

HOPE v. BREWER.

(Court of Appeals of New York, 1892. 136 N. Y. 126, 32 N. E. 558, 18 L. R. A. 458.)

Thomas Hope died domiciled in the state of New York. By the residuary clause of his will he devised and bequeathed all the residue and remainder of his property to his executors and their survivors, in trust for the purpose of founding and endowing an infirmary for the care and relief of sick and infirm persons, to be established at the testator's native place of Langholm, in Dumfrieshire, Scotland. The executors were required to convert the residuary estate into money and to pay the same over to the Scotch trustees, who were empowered to establish the institution and to administer the charity. The dispositions of the residuary estate were perfectly valid under the law of Scotland, and the foreign trustees were competent to take the fund and to administer the trust under Scotch law. This action is brought by a nephew of the testator to set aside as void the dispositions of the residuary estate on the ground that they are too indefinite and uncertain in their subjects and objects and unlawfully suspend the power of alienation of real estate and the absolute ownership of personal property.[16]

O'BRIEN, J.[17] * * * This brings us to the important question in this case, whether the courts of this state are required in such a case to interpose our own laws with respect to the requisites of a valid testamentary trust in order to defeat the disposition which the testator has made of his property, and which is perfectly valid where he intended the gift to take effect. In the great variety of cases bearing upon the validity of trusts of this character, and in the manifold aspects in which questions growing out of such dispositions of property have arisen and been presented to the courts, it is not, perhaps, surprising that, in some of the opinions of the courts, dicta, expressed in general language, may be found giving support to the plaintiff's contention. But I have not been able to find any well-considered case, in which the question was directly involved, where a gift to a foreign charity in trust, contained in a valid testamentary instrument, has been held void, where there was a trustee competent to take and hold, and the trust was capable of being executed and enforced, according to the law of the place to which the property was to be transmitted under the will

[15] Lord Kinnear delivered a concurring opinion, which has been omitted.
[16] This brief statement of facts has been abstracted from the opinion.
[17] A part of the opinion has been omitted.

of the donor. The law of this state inhibiting the creation of trusts not expressly authorized by statute, and the suspension of the power of alienation of real estate, and the absolute ownership of personal property, is founded upon a public policy of our own. It was said of the English statute of mortmain that its object was political, and intended to have but a local operation. It was enacted to prevent what was deemed a public mischief, and not to regulate, as between ancestor and heir, the power of disposing by will, or to prescribe, as between grantor and grantee, the forms of alienation. It is an incident only, and with reference to a particular object, that the exercise of the owner's dominion over the property is abridged. The restraints which the statutes imposed upon owners of property had reference to a mischief existing in England only. Attorney General v. Stewart, 2 Mer. 143. Statutes of a kindred nature, enacted in this state and in the various states of the Union, whatever their form, were intended to operate within and promote the welfare of the people of each particular state, and it was not contemplated that they should have any extraterritorial effect. It is not a matter of any public concern whatever to this state whether the personal property of a person domiciled here shall pass to his heirs or next of kin in a foreign country, or to trustees in trust for charity residing there, or even to a foreign corporation for purposes of charity. Vansant v. Roberts, 3 Md. 119.

Our law with respect to the creation of trusts, the suspension of the power of alienation of real estate, and the absolute ownership of personal, was designed only to regulate the holding of property under our laws and in our state, and a trust intended to take effect in another state, or in a foreign country, would not seem to be within either its letter or spirit. When a citizen of this state, or a person domiciled here, makes a gift of personal estate to foreign trustees for the purpose of a foreign charity, our courts will not interpose our local laws with respect to trusts and accumulations to arrest the disposition made by the owner of his property, but will inquire as to two things: First, whether all the forms and requisites necessary to constitute a valid testamentary instrument, under our law, have been complied with; and, second, whether the foreign trustees are competent to take the gift, for the purposes expressed, and to administer the trust under the law of the country where the gift was to take effect; or, as Judge Rapallo stated the rule with respect to gifts to charity generally, the inquiry is "whether the grantor or devisor of a fund designed for charity is competent to give, and whether the organized body is endowed by law with capacity to receive and to hold and administer the gift." Holland v. Alcock, 108 N. Y. 337, 16 N. E. 305, 2 Am. St. Rep. 420. In this case the testator was unquestionably competent to give, and did make the gift under all the forms and requisites necessary to constitute a valid testamentary disposition. So were the trustees to whom the gift was made, competent to take and administer it, under Scotch law, and the only question is whether we

must defeat the gift and frustrate the intentions of the testator because he neglected to observe, in all respects, the rules of our local law with regard to the creation of trusts and perpetuities.

Unless we are concluded upon this question by established principles of law, there is no reason growing out of the facts surrounding the case, or founded upon public policy, for diverting the property into channels not contemplated by the testator. It is no doubt true that the validity of a disposition of personal property at the domicile of the owner is generally the test of its validity in other jurisdictions. But this rule, I apprehend, only requires compliance with forms and with principles of law generally or universally recognized as essential to the transfer or transmission of property. If personal property is disposed of by will, and in trust for charity, to take effect in another country, no good reason is apparent for insisting that a full compliance with the local law of the domicile, with respect to the form or duration of the trust, or the definition of the beneficiaries, is necessary to the validity of the disposition. Such laws are not generally regarded as limitations upon the power of the owner to transfer or transmit the property, but regulations applicable to the holding of property in the particular community, founded upon political or social considerations. In Cross v. Trust Co., 131 N. Y. 330, 30 N. E. 125, 15 L. R. A. 606, 27 Am. St. Rep. 597, we held that a disposition of personal property by will and in the form of a trust, to be executed in this state, made by a person domiciled in another state, valid at the place of the domicile, was valid here, though the absolute ownership of the property was suspended for a period longer than is permitted by our statute. The principal ground of that decision was that our courts were required, under the doctrine of comity, to recognize a disposition of personal property made in another state as valid, if valid there, and not in its nature unlawful, or against public policy. In the creation of the trust our statute in regard to perpetuities was disregarded, but we held that it did not apply to a will made by a person who was domiciled in another state. In order to sustain this will, we must go a step further, and hold another, but a kindred proposition, namely, that a disposition of personal property made in this state, by a competent testator, in a valid testamentary instrument, to trustees in a foreign country, for the purposes of a charity to be established in that country, is valid, although not in compliance with our statute or the rules of law in force here in regard to trusts and perpetuities, providing it is valid by the law of the place where the gift is to take effect, and which governs the trustee and the property when transmitted there. If our statute, as I have attempted to show, does not apply to such a case, then there is nothing in the way of the validity of such a disposition of property. The question has been often referred to in this court, and, though the precise question was not involved, the expressions of opinion are in favor of sustaining this will. In the leading case of Chamberlain v. Chamberlain, 43 N. Y. 424, Allen, J., discussing

the question, said: "The courts of this state will not administer a foreign charity, but they will direct money devoted to it to be paid over to the proper parties, leaving it to the courts of the state within which the charity is to be established, to provide for its due administration and for the proper application of the legacy. Hill, Trustees, 468; 2 Story, Eq. Jur. § 430; Provost, etc., of Edinburgh v. Aubrey, Amb. 236; Burbank v. Whitney, 24 Pick. 154, 35 Am. Dec. 312; Attorney General v. Lepine, 2 Swanst. 181. * * * A gift by will of a citizen of this state to a charity or upon a trust to be administered in a sister state which would be lawful in this state, the domicile of the donor, would not be sustained, if it was not in accordance with the laws of the state in which the fund was to be administered. Bequests in aid of foreign charities, valid and legal in the place of their existence, will be supported by the courts of the state in which the bequests are made. Hill, Trustees, 457. If the legatee, whether a natural or an artificial person, and whether he takes in his own right or in trust, is capable, by the law of his domicile, to take the legacy in the capacity and for the purposes for which it is given, and the bequest is in other respects valid, it will be sustained irrespective of the law of the testator's domicile. * * * It is no part of the policy of the state of New York to interdict perpetuities or gifts in mortmain in Pennsylvania or California. Each state determines these matters according to its own views of policy or right, and no other state has any interest in the question, and there is no reason why the courts of this state should follow the funds bequeathed to the Centenary Fund Society to Pennsylvania to see whether they will be there administered in all respects in strict harmony with our policy and our laws. The question was before the court in Fordyce v. Bridges, 2 Phil. Ch. 497, upon the bequest of a fund in England to be invested in a Scotch entail. Lord Cottenham says: 'An objection was made that the bequest of a fund, to be invested in a regular Scotch entail, was void as a perpetuity. The rules acted upon by the courts of this country, with respect to testamentary disposition tending to perpetuities, relate to this country only. What the law of Scotland may be upon such a subject the courts of this country have no judicial knowledge, nor will they, I apprehend, inquire. The fund being to be administered in a foreign country is payable here, though the purpose to which it is to be applied would have been illegal, if the administration of the fund had been to take place in this country. This is exemplified by the well-established rule in cases of bequests within the statute of mortmain. A charity legacy void in this country under the statute of mortmain is good and payable here, if for a charity in Scotland.' To the same effect is Vansant v. Roberts, 3 Md. 119."

In the case of Manice v. Manice, 43 N. Y. 303, Judge Rapallo, discussing the validity of a bequest by a person domiciled in this state to Yale College, said: "The direction to pay to the treasurer is a good gift to the college, the college having been shown to be capable of

taking. Emery v. Hill, 1 Russ. 112; De Witt v. Chandler, 11 Abb. Pr. 459; Hornbeck v. Society, 2 Sandf. Ch. 133. The college is a foreign corporation, it being authorized by the laws of its own state to take. * * *" After discussing the question whether the words of the will were sufficient to create a trust, the learned judge continued: "These are questions, however, which must necessarily be determined by the courts of the state in which the corporation legatee is situated. The fund is to go there, and be there administered. The will of the testator, so far as the courts of this state can act upon it, is fully executed when the money is paid to the proper officer of the foreign corporation; and there is no law of this state prohibiting gifts to such foreign corporation. Though the laws of the state of that corporation may permit it to hold and administer property in perpetuity, or to accumulate it, the local policy of this state upon that subject is not interfered with by allowing property of our citizens to pass to such foreign corporation, and be administered by it in such foreign state according to its own laws. Fordyce v. Bridges, 10 Beav. 105, 2 Phil. Ch. 497; Vansant v. Roberts, 3 Md. 119; Chamberlain v. Chamberlain, 43 N. Y. 424."

The same doctrine was approved in the subsequent case of Despard v. Churchill, 53 N. Y. 192, and property in this state of a testator in California was remitted to that state, to be administered under the will, notwithstanding it was devoted to the purposes of a trust which would have been unlawful in this state, though valid there. We have recently held that a bequest of the residuary estate of a testator domiciled here to a municipality in the German empire was valid, it appearing that the municipality had capacity by the law of the place to take and hold the gift. In re Huss, 126 N. Y. 537, 27 N. E. 784, 12 L. R. A. 429. See, also, Kerr v. Dougherty, 79 N. Y. 327; Hollis v. Seminary, 95 N. Y. 166.

We have examined the cases cited by the learned counsel for the plaintiff in support of his contention. They contain general expressions of the rule that a testamentary disposition of property invalid at the domicile of the owner is invalid everywhere, and, indeed, this rule is stated in some of the cases to which I have referred, and, as a general principle, cannot be questioned. But when it is said that such a disposition is invalid everywhere if invalid at the domicile, the rule refers to some defect in the execution of the instrument, the capacity of the testator, the legal construction of the instrument, the form or object of the disposition, and not to the noncompliance, in framing the terms of the trust, with a local statute or rule of law regulating the holding of property by the citizens of the state or country where the will was made, and which had no extraterritorial force. Perhaps the strongest case in support of the plaintiff's view is that of Bascom v. Albertson, 34 N. Y. 587. In that case there was a bequest of the residuary estate by a testator in this state to five unnamed persons as trustees, to be appointed by the Supreme Court of the state of Ver-

mont, to found and establish an institution in that state for the education of females. This bequest was held to be void. The discussion in this court proceeded almost entirely upon the question whether it could be sustained under the English doctrine of charitable uses sanctioned by a majority of the court in Williams v. Williams, 8 N. Y. 525, and it was held that it could not. The case differs from the one at bar in, at least, one important particular. The testator failed to appoint trustees competent to take, and it did not appear that those appointed by the action of the judges of the Supreme Court of Vermont could take or hold, or that the trust could be administered, under the laws of that state. Besides, the views expressed in the prevailing opinion, in so far as they are in conflict with the judgment now under review, must be deemed to be modified by the subsequent cases of Chamberlain v. Chamberlain, Manice v. Manice, and Despard v. Churchill, supra. Our conclusion is that, even if it be assumed that the bequest of the residuary estate to the Scotch trustees, in trust for the purpose of founding and maintaining the hospital, should be held void under our law for the reason that the absolute ownership of personal property is unlawfully suspended, or that the beneficiaries of the trust are not sufficiently specified or defined, still that does not render the disposition invalid, as these objections do not apply to a gift in trust to be administered in Scotland, and perfectly valid there. This result, I think, is in harmony with the general tendency of courts to sustain testamentary dispositions of property when it fairly can be done under the rules of law, and in accordance with principles of enlightened justice. The judgment should therefore be affirmed, with costs to the executors, the foreign trustees, and the plaintiff, payable out of the estate. All concur.[18]

MAYOR, ALDERMEN AND CITIZENS OF CANTERBURY v. WYBURN.

(Judicial Committee of Privy Council, 1894. [1895] L. R. App. Cas. 89, 64 L. J. P. C. 36.)

Lord HOBHOUSE. On the 13th of June, 1891, J. G. Beaney, an inhabitant of Melbourne and a domiciled Victorian, died, having by a codicil to his will bequeathed legacies to the appellants in the following terms:

"I direct my said trustee to pay to the mayor and corporation of the said city of Canterbury for the time being the sum of ten thousand

[18] The law of the testator's domicile and not the law of the domicile of the trustee will determine whether an active or passive trust has been created. Rosenbaum v. Garrett, 57 N. J. Eq. 186, 41 Atl. 252 (1898). But the question whether the income of a trust fund is subject to the claims of creditors is governed by the law of the state where the trust fund is situated. Keeney v. Morse, 71 App. Div. 104, 75 N. Y. Supp. 728 (1902).

pounds, for the purpose of their buying a suitable piece of ground at Canterbury aforesaid and erecting thereon with as little delay as possible a free library and reading-room for the working classes; such building when erected to be called the 'Beaney Institute for the Education of Working Men.' And I also bequeath to the said mayor and corporation of the said city of Canterbury all my medical diplomas and military commissions for the purpose of their being hung up and exhibited in the principal hall of the said building so to be erected as aforesaid."

By another codicil he bequeathed some more articles of a like kind in a like way. His residuary legatees are certain charitable institutions in Melbourne, of whom the respondents, the Melbourne Hospital, have been selected to defend the interests of all. They contend here that the gift of £10,000. to the appellants must fail by reason of the English statute law which restricts gifts to charitable uses.

The case was argued before A'Beckett, J., upon certain questions propounded for the court to answer; and by his answers that learned judge maintained the validity of the gifts, and directed the executors to comply with the directions of the testator. He finds that there is nothing in the law of Victoria to forbid such a testamentary gift. He adds:

"If it had been shown that under the law as it stands in England the corporation of Canterbury could not lawfully spend £10,000. in buying land and erecting a building as contemplated by the testator, and therefore that the object of the testator could not lawfully be accomplished, I should not direct the executors to pay the legacy to the corporation. This has not been shewn. It appears that the corporation could lawfully have expended £10,000. in this manner if the testator had sent the money to them in his lifetime, and that they will have the right to spend it in this manner if sent them by his executors as directed by his will."

The residuary legatees appealed, and the full court varied the decision of the first court by holding that the bequest of money was invalid, and, the residuary legatees consenting, that the bequests of chattels were valid. The reasons of the three learned judges are in substance identical. They consider that as the £10,000. is given for the purchase of land in England the case is the same as if the testator had actually devised land of his own in England, and they argue, justly enough, that nobody can so operate on English land.

From their order, holding the bequest of money invalid, the present appeal is brought; and their Lordships have to consider whether it is right. Of course, there is no doubt of the competency of the English legislature to forbid such gifts. The question is whether it has done so. It would seem that this is the first occasion on which such a question has come into court for decision.

It appears to their Lordships that the arguments relied on by the full court, and by the respondents' counsel at this bar, err in exag-

gerating the amount of prohibition imposed by the English statutes, and in ascribing to it a more absolute effect than it really has. The Attorney General indeed, in his argument for the residuary legatees, insisted on the title of the Act of 9 Geo. II, c. 36, passed in the year 1736: "An act to restrain the disposition of lands, whereby the same become unalienable." That title correctly expresses the object of the act; but it is manifest from the preamble and the operative parts of the act that it does not purport to restrain every such disposition, nor does the title say that it does. If there were an absolute prohibition of all gifts of land for charitable uses, Mr. Beaney's gift could not take effect. But as in fact the English statutes leave all persons as free as they were by common law to give or to receive any amount of land for those purposes, provided only that they observe the positive rules prescribed for them, the question in each case is whether the mode of acquiring land is a lawful or a forbidden one.

The statute which governs this question was passed in the year 1888 (51 & 52 Vict. c. 42), and, according to a recent practice, it has no preamble to give the key to its policy. But it is mainly an act of consolidation; if it effects any alteration in the previous law, the difference does not concern the question now to be decided; and it must be taken that its provisions rest upon precisely the same policy as those of St. 9 Geo. II, c. 36.

The preamble of that statute refers to the older statutes passed to restrain the mischiefs of gifts in mortmain. Then it proceeds: "Nevertheless this publick mischief has of late greatly increased by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called charitable uses, to take place after their deaths, to the disherison of their lawful heirs; for remedy whereof be it enacted." This, then, was the mischief which the Legislature desired to abate: the increase of land held in mortmain by gifts which may for brevity, and somewhat loosely, be termed deathbed gifts. The mode taken to restrain this mischief was to enact that no land, nor any money to be laid out in the purchase of land, should be given to any person for the benefit of any charitable use, unless the gift be made by deed executed twelve calendar months, at least before the death of the donor, and enrolled in Chancery within six calendar months of its execution, and unless the gift be made to take immediate effect. Another section extends the prohibition to charges affecting land, which is a large class—at that date a much larger relative class than now—of personal estate; and it declares that the prohibited gifts shall be absolutely null and void. Therefore, in all cases of wills to which the statute applies, such gifts are prohibited by its express terms.

It is expressly enacted that the statute shall not extend to the grant of any estate in Scotland. After a time came the question whether it extends to the colonies, and that question was settled in the negative in the case of Attorney General v. Stewart, 2 Mer. 143, decided by

Sir William Grant in the year 1817. He considered that both the mischief struck at by the act, and the methods prescribed for lawful gifts, were of a local character peculiar to England. Therefore, he held that the act did not extend to Grenada, though it is in general terms, and though the laws of England had been extended in general terms to the island when first ceded in 1763, and again when recovered in 1784. That opinion has ever since prevailed, and in the case of the Gilchrist foundation (Whicker v. Hume, 7 H. L. Rep. 124), it was applied to a gift of land in New South Wales.

In that state of the law the present act of 1888 was passed. By section 4, subsec. 1, it is enacted thus:

"Subject to the savings and exceptions contained in this act, every assurance of land to or for the benefit of any charitable uses, and every assurance of personal estate to be laid out in the purchase of land to or for the benefit of any charitable uses, shall be made in accordance with the requirements of this act, and unless so made shall be void."

The requirements of the act are substantially those of the act of 1736. If the assurance is of personal estate not being stock in the public funds, it must be made by deed enrolled within six months of the execution, and, if it is not made for full valuable consideration, executed twelve months before the death of the assurors. By the interpretation clause the term "assurance" includes a will. This act therefore, subject to some special exemptions, prohibits "death-bed" gifts as strictly as does the earlier act. But it is impossible to suppose that the English legislature intended to affect a will subject to the law of Victoria. All the reasons against such a construction which were applied to the earlier enactment apply to the later one.

It is expressly declared that the act does not extend to Scotland or Ireland. To declare that a bequest made by a colonial will shall be void on the ground that it contravenes the local law of England may not be beyond the competence of the imperial Parliament, but is quite beyond its ordinary scope, and such an intention ought not to be imputed to it without very clear grounds. Seeing, indeed, that the repealed and consolidated statutes did not apply to the colonies, and that Scotland and Ireland are expressly excepted from the new statute, it is impossible without express words to suppose that there was any intention of affecting the colonies by the new statute. Moreover, Sir Wm. Grant's other reasons apply exactly to the present question. It cannot have been intended that methods of a local character prescribed for making a lawful gift should be adopted in a distant colony, or, if not, that the gift should be invalid.

Indeed, the case for the residuary legatees is not rested on any such broad ground as this. The courts below are agreed that the Victorian testator is quite free to make such a gift as he has made; nor has the contrary been contended here. But for that conclusion the word "assurance" in the act must receive the qualification that it means something which is governed by English law.

Of course it is a different thing to say that English law must decide whether English land can be bought with money coming from such a source as a foreign will; and that, if it decides in the negative, the bequest must fail, not because it is illegal, but because it is impossible of execution. The Attorney General stated broadly that the prohibitions of the statutes of mortmain are an integral part of the English law of real property. So they are; but the question is how far they operate. The suggestion is that they operate to invalidate gifts of money coupled with an obligation to lay them out in land, if they have their origin in a will, though a perfectly valid will. Their Lordships cannot find such a prohibition in the act. They have reached the conclusion that this will is not invalidated by subsection 1. At what point, then, of the transactions does the English law come in? Not between the Victorian testator and his Victorian executor. In their Lordships' view the English law will operate whenever a purchase of land for the charitable uses is effected, but no earlier. The assurance of that land must be made in accordance with the provisions of the act. Anybody may give money for such a purpose in the permitted mode. The testator might himself have bought land in Canterbury and have devoted it to charitable uses quite lawfully. What he might do himself he might do through trustees, by giving money to trustees for the purpose of acquiring land in a lawful way. Is there anything to prevent him from ordering his executors to do the same thing? The answer is that his will is not affected by English law. It is a valid will binding on his executors; and a Victorian court of justice should direct them to perform their obligation.

It has been contended very earnestly that the point is settled by the decision in Attorney General v. Mill, 2 Dow. & Cl. 393. In that case the testator was a native of Montrose. He spent many years in the island of Cariacou, where he owned land and amassed a large fortune. He returned to Montrose, and stayed there about five years. Then he came to England, and resided first in London and afterwards in Bath, up to his death in 1805, fourteen years afterwards. In 1791 he executed a will and a deed, by which he gave money to be invested in the purchase of land, ordering the income to be paid to certain Scottish trustees for the benefit of indigent ladies in Montrose. His will, with four codicils, all in English form, was proved in England. In his will and contemporaneous deed he described himself as of the island of Cariacou, now residing in Marylebone. His codicils, it was stated at the bar, contained similar descriptions. His foreign assets were transmitted to England and were administered under the direction of the Court of Chancery and were the subject of a decree which paid no regard to the charitable gift. Subsequently an information was filed by the Attorney General for the establishment of the charity by purchase of land in Scotland. It was held by Lord Lyndhurst, first in Chancery and afterwards in the House of Lords, that the tes-

tator must be taken to have directed the purchase of land in England, and that his gift contravened the mortmain laws and was void.

It is now argued that the testator was a domiciled Scotsman, and that the case decides that a bequest of money in a Scottish will directing the purchase of land in England for a charity is a void bequest. But the assumption that the testator had a Scottish domicile is not warranted by anything to be found in the reports. In the meagre history of his life there is much to suggest arguments for an English domicile, and the counsel for the Attorney General who was contending for the validity of the gift did not suggest any other domicile. The word "domicile" occurs only twice in the reports of the case. In one of them (2 Dow. & Cl. 394) the reporter uses a casual expression to the effect that on leaving Cariacou the testator resumed his domicile in Montrose; an expression which Lord St. Leonards, writing many years afterwards, repeated. But the Scottish origin of the testator, and his connection with Montrose, were only used as arguments to shew that he contemplated the purchase of land in Scotland—a conclusion which one of the reasons appended to the appellant's case urged the House to adopt "even if he were domiciled in England." For some reason, doubtless a sufficient one, it was the common ground of argument that the will was governed from first to last by English law. There is not a trace in the reported statements, arguments or judgments that anybody asked what would be the effect of a will not governed by English law, which is the question now propounded to their Lordships.

It is true that Story, J. (Conflict of Laws, § 446) and Mr. Westlake (Private International Law, § 165) both treat the decision as covering the case of a foreign will. But on examining the case that appears to their Lordships to be a misapprehension of the point really decided. So far as they know, the present question is wholly untouched by authority.

The Attorney General dwelt on the amount of land which might be brought into mortmain if such bequests as these were allowed to take effect. Such considerations can hardly influence the construction of a statute except so far as they may appear to have been present to the minds of its framers. Their Lordships can hardly suppose that any one would feel alarm at the idea of foreigners giving large sums of money to English purposes; and, if it be true that this is the first case of its kind to come into court, the experience of a century and a half tends to prove the futility of any such alarm. But, however that may be, their Lordships must construe the words of the statute according to their plain meaning, and leave it to the Legislature to enact further prohibitions, if found expedient.

The result is that their Lordships will humbly advise Her Majesty to discharge the order of the full court, except so far as it deals with the specific chattels and with costs. This will in effect restore the judgment of Mr. Justice A'Beckett. It has seemed right to both the

courts that the costs of all parties to the litigation should be paid out of the testator's estate, those of the plaintiffs, who are the executors, being taxed as between solicitor and client. Their Lordships have been asked to follow the same course in disposing of the costs of this appeal; and the residuary legatees raise no objection. Their Lordships will order accordingly.

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DAMMERT v. OSBORN.

(Court of Appeals of New York, 1893. 140 N. Y. 30, 35 N. E. 407.)

O'BRIEN, J.[20] Jose Sevilla, residing and domiciled at Lima, in the republic of Peru, died there on the 9th of December, 1886, having made and published his last will and testament, bearing date July 2, 1885, by which he disposed of a large estate, consisting mostly of personal property, a considerable portion of which, or the evidences thereof, was at the time of his death actually within this state. The will was duly proved and established under the usual and proper judicial proceedings in the courts of the country where the testator was domiciled, having by law jurisdiction in such cases, and executors appointed pursuant to its provisions. These executors, residing in Peru, together with the appointed heirs and residuary legatees, caused the will, or a copy thereof, to be recorded in the office of the surrogate of New York; and thereupon, with their assent and upon their motion, the plaintiffs were appointed ancillary executors in this state, and, having qualified, and entered upon the duties of the trust, took into their possession the personal estate here. The single provision of the will out of which the questions arise which are involved in this appeal is a charitable bequest for the education of poor female children in the city of New York. The several clauses by means of which the testator sought to accomplish this purpose are quite elaborate and formal, and their substance and effect will be sufficient to give a clear view of the general purpose, as well as the mode in which it was to be executed: The testator states in the will that in the previous year, 1884, he executed a will by which he left the larger part of his fortune to found an institution in New York under the name of the "Sevilla Home for Children," and in which he formulated the details of support and management; but in view of the unfortunate situation of his relatives, and various persons dear to him, he deemed it necessary to reconcile this desire with his duties to his family. He then proceeds to declare that it is his will that there be established in the city of New York, and permanently maintained, an institution to be known as the "Sevilla Home for Children," to be managed by his executors and a board of philanthropic managers, and devoted to the education

[20] A part of the opinion has been omitted.

of poor female children. He directed that in all matters relating to the institution a prudent economy be observed; that the buildings be adequate to the end to be attained, constructed to receive from 50 to 100 children, and the teachers required; the land to be purchased and buildings erected at moderate prices. The managers were empowered to make rules for the government of the institution in the best manner, not forgetting the following conditions: (1) Only very poor children, from 5 to 10 years of age, fit for apprenticeship, and free from ailments, were to be admitted, to remain in the home until they attained the age of 16. (2) The food and clothing to be economical and suitable, and the latter to be of uniform pattern and color for all. (3) The instruction to be primary, and upon the basis of a moral education, with directions as to the practical branches to be taught. (4) Day scholars to be admitted, providing they did not occasion expense; to be kept apart from the boarders, in order to preserve the moral tone. He then gives directions for investing any money earned by the children, whenever that was possible, one-half to be paid to them at 16, and the other half devoted to the support of the school. The number of children to be always subordinate to the resources; preference to be given to natives of Peru, upon the recommendation of Peruvian consuls at New York, or the place where application was made. The fitness of the children being proved, the managers could not, within the limit as to numbers, refuse them admission, for any motive whatever. The board of philanthropic managers to be composed of seven prominent citizens of the city of New York, to be selected by the surrogate from a list which the testator named. For the purpose of founding and endowing the institution, $500,000 was bequeathed in the securities, constituting his estate, at par, to be delivered to the board by the executors. The board was directed to postpone the purchase of land and construction of buildings for two years after delivery of the securities, in order that the school should be founded with the accumulated interest in that period, without reducing the principal sum for that purpose. The executors and appointed heirs were directed to transmit to the municipality of New York a copy of the clauses of the will relating to the institution, and the testator requested the municipal authorities to watch over and care for the fulfillment and performance of the will in this regard. The trustees were appointed in conformity with the terms of the will, and accepted the trust, and have been made defendants in this action. The plaintiffs, as ancillary executors, have possession of the securities devoted by the will to the founding of the home, and hold the fund bequeathed subject to the order and direction of the court.

The trustees, or "philanthropic managers," as they are designated by the will, applied to the Legislature of this state for incorporation, and upon this application chapter 17, p. 14, of the Laws of 1889 was enacted, by which they, and such other persons as they might associate with themselves in accordance with the provisions of the will,

were created a body corporate and politic under the name and title of the Sevilla Home for Children. The incorporators were, by name, declared to be the permanent trustees of the corporation, in accordance with the will of the testator; and in case of a vacancy by death, resignation, or otherwise, the survivors were empowered to fill it in accordance with the directions of the will, as near as may be, so that the number should be kept at seven. The trustees were given full power to control and manage the corporation, and for that purpose to make by-laws, and appoint such agents and officers as might be deemed necessary, and to fix their tenure of office as well as their own. The corporation was declared to possess all the powers, and, except as otherwise provided by the act, to be subject to the provisions of the Revised Statutes. It was expressly empowered and directed to accept and receive the gift bequeathed by the will upon the terms and conditions there expressed, and power was conferred upon it to enter into any obligation in order to secure compliance with such terms and conditions. In addition to the powers conferred by law upon corporations, it was declared that this corporation should have power and capacity to establish and maintain a home for the education of poor children in the city of New York as provided in the will, and for that purpose to demand and receive the fund bequeathed by the will for that purpose, and to hold, manage, and dispose of the same in such manner as might be best calculated to carry out the objects and purposes indicated by the testator. The trustees accepted the trust under the act of incorporation, and organized under it. The will contains various other large bequests to relatives and friends and for charitable purposes, the validity of which is not involved in this action, and, so far as appears, they are not questioned by any one. In the thirty-sixth clause the persons are designated by the testator who were empowered to administer the estate and carry out the will, and, in what seems to be the language of Peruvian law, they are called "executors," and appointed as testamentary heirs; and they were, by the terms of the will, to co-operate with the trustees in founding the institution and administering the gift. The plaintiffs, in their complaint, state all the facts, and ask for the judgment of the court with reference to the disposition of the fund in their hands. The defendants are the trustees named in the will, and the corporate body created upon their application, and the executors, appointed heirs, and residuary legatees named by the testator. It appears that they were all served, but none of them answered, or made any claim to the fund, except the corporation known as the Sevilla Home for Children, the trustees, and the Sociedad de Beneficiencia de Lima, one of the residuary legatees. The latter is the only party to the action who really disputes the right of the corporation or the trustees to the fund.

[The will directed that said Sociedad should receive the various legacies of public interest, and should deliver them over to the respective institutions in the will named, and that if any such institu-

tions should decline to receive the same, the legacy to it should pass to said Sociedad.]

The learned judge before whom the cause was tried at the Special Term held that the bequest for the Sevilla Home was void, as contravening the statute of this state against perpetuities, and for other reasons, and that none of the defendants were entitled to receive the gift; and he directed that the plaintiffs account for the fund to the executors and appointed heirs in Peru, and, to that end, that the fund be remitted to that country, without determining to whom the beneficial interest in the fund belonged. The General Term has affirmed the judgment, and the Sevilla Home and its individual trustees have appealed to this court.

At every stage of the inquiry pressed upon us by this appeal, it is important to keep in view a fundamental fact established by uncontradicted evidence at the trial, and conceded upon the argument, and that is that the bequest to the Sevilla Home was perfectly valid by the law of Peru, the domicile of the testator, which governed his personal property, wherever it was at the time of his death. The validity of the gift by the law of the domicile necessarily involves the conclusion that it is not affected, under that law, by the fact that at the time of the testator's death there was no trustee competent to take, or that the estate did not vest within a period measured by lives, or by the general and indefinite nature of the trust, nor any other local rule that would defeat the intention of the testator in case it had been a domestic will. The general principle that a disposition of personal property, valid at the domicile of the owner, is valid everywhere, is of universal application. It had its origin in that international comity which was one of the first fruits of civilization; and in this age, when business intercourse and the process of accumulating property take but little notice of boundary lines, the practical wisdom and justice of the rule is more apparent than ever. It would be contrary to the principles of common justice and right upon which the rule is founded to permit a testamentary disposition of personal property, valid by the law of the domicile, to be annulled or questioned in every other country where jurisdiction was obtained over the property disposed of, or the parties claiming it, except for the gravest reasons. There are, no doubt, some exceptions to the rule, founded upon considerations of public policy and necessity. Foreign contracts or dispositions of property, which, if carried out, would endanger the public morals or the public safety, or undermine the political or social fabric, or subvert the administration of justice, or have other evil tendencies, are not within the rule, as the right and duty of self preservation is higher and stronger in every community than any obligation founded in comity. But the object of this bequest, instead of tending to such results, was highly laudable and commendable, and certainly there is no public policy that forbids its execution. The law allows, and in every proper way encourages, such gifts, and sustains them, when capable of exe-

cution, and, even when they are not, it does not hold them void, if valid under the law of the domicile; and it is only in cases where there is no adequate legal regulation for administering or carrying them into effect that the property will be remitted to the government of the domicile for administration. None of the parties in this case have acquired any title to the fund in question that they are not given by the law of Peru. Our courts may in certain cases, decline to administer the gift, and remit the property to the principal seat of administration; but they cannot divest the title of one, or transfer it to another, contrary to the law of the domicile. That law is part of the disposition, and the foundation of all title under it, and it cannot be disregarded, to the prejudice of one and the benefit of another, any more than the other parts of the instrument. There is no law that forbids gifts to charity here by testators in other countries, or that requires us to reject the gift unless it is made, in all respects, in conformity with our local law. There is no public policy on that subject, except what is to be found in the language of the statute, and that provides that "the absolute ownership of personal property shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or, if such instrument be a will, for not more than two lives in being at the death of the testator." 2 Rev. St. (6th Ed.) p. 1167, pt. 2, c. 4, tit. 4, § 1.

When that statute was passed, it was not within the legislative purpose to interdict dispositions made in other countries to take effect here. There is nothing in the language used that indicates such a purpose. There are other statutes that invalidate testamentary gifts to certain corporations unless made within a certain time before death, where the testator had wife, children, or parents. The purpose of these statutes is evident. They were intended to prevent improvident and hasty bequests, to the prejudice or neglect of those natural obligations which the law also imposes upon the citizen. But these restraints applied to members of the political community from which the law emanated, and not to persons in other countries, where no such restrictions existed, and who desired to give according to their own laws. Bequests by such persons to those corporations, without regarding the statutes referred to, would be good, if valid at the domicile of the testator. Hollis v. Drew Theo. Seminary, 95 N. Y. 171. It is no part of our public policy to condemn such gifts to charitable or benevolent corporations here. Our law permits the citizens or subjects of other countries to dispense charity here in such measure as they wish, and according to such methods as their own laws prescribe. The policy that dictated our statutes against perpetuities and accumulations did not anticipate any danger from abroad, and our recent decisions are to the effect that they are local in their general scope and effect. Cross v. Trust Co., 131 N. Y. 330, 30 N. E. 125, 15 L. R. A.

606, 27 Am. St. Rep. 597; Hope v. Brewer, 136 N. Y. 126, 32 N. E. 558, 18 L. R. A. 458.

In the first case cited, we held that a testamentary disposition of personal property in trust, by a person domiciled in another state, valid by the law of the domicile, though in some respects contrary to our statute, was not void; and we refused to annul the will of the testator, that had taken effect and been acted upon here for many years. In the second case, we refused to interfere with a testamentary disposition in a domestic will containing a trust for a charity in a foreign country, where it was valid and capable of being executed and enforced, although, perhaps, under our law, the beneficiaries were not sufficiently defined, and it may have been open to other objections. The trend of these cases is unquestionably towards the conclusion that our statutes apply to domestic wills, that by their provisions are to be executed here. An accumulation to take effect in another country, or a bequest made there to take effect here, was not within the intention of the Legislature when these statutes were framed. There is, however, this clear distinction between the cases cited and the one at bar: In the former, we were not asked to aid in any way the execution of the will or the administration of the trust, but to declare it void at the suit of heirs or next of kin. The parties who stood upon the dispositions of the will simply asked us to allow them to execute the testator's purpose with respect to his property, and to manage their own business in their own way. But in this case we are asked, virtually, to put the Sevilla Home in possession and control of the fund, and thus give active aid and assistance in the enforcement of a trust which, in a domestic will, would doubtless be void, and therein is the real difficulty which the situation presents. The objection to this relief, which, under ordinary circumstances, might be formidable, has been, we think, greatly obviated, if not entirely removed, by the legislation which has been enacted since the death of the testator. That has a much broader scope and operation than the mere creation of a corporate body. It is an expression of the will of the supreme legislative power that the gift in question should be received and administered in the manner and for the objects designated in the will, as near as may be; and thus every existing legal obstacle to the execution of the testator's purpose must be deemed to have been suspended, or pro tanto repealed. The Legislature, in effect, said that, notwithstanding the indefinite nature of the trust, if it was indefinite, or the circumstance that the testator did not appoint a trustee competent to take, or that the absolute ownership was suspended for a period not measured by lives, this gift shall take effect, according to the intention of the donor, and be adminstered by a corporate body of its own creation. The Legislature had the power to so enact, unless, in the mean time, the title or beneficial interest had vested in heirs, next of kin, or legatees; and as, under the law of the domicile, it did not, the power of the Legislature to accept a gift that was awaiting a com-

petent trustee to administer it cannot well be doubted. It is not important to ascertain or decide where the title to the fund was lodged in the mean time. It was wherever the law of Peru placed it. Whether in the executors, for the purpose of delivering it to the trustees, or in abeyance, it matters not. So long as that law would not permit it to vest in any other person, or for any other purpose, no property right was violated by the legislation. Had the title vested elsewhere in the mean time, in consequence of the invalidity of the bequest, or for any reason of course that title could not be disturbed by the Legislature. But by force of the law of the domicile, upon the facts disclosed by the record, if the fund should be remitted to the executors in Peru, pursuant to the judgment, they would, in the discharge of the trust imposed upon them by the testator, be bound to pay it over to the Sevilla Home for the purpose declared in the will, as the Legislature had, subsequent to the death of their testator, created a competent body to execute that purpose without affecting any private right. The necessity or expense of such circumlocution is not perceived. Generally, whatever the law will permit to be done indirectly may be done directly.

There is another and more recent statute that has some application to this case, as it is the last expression of the legislative will on the subject, and discloses what our public policy is with regard to such bequests. By chapter 701, p. 1748, of the Laws of 1893, entitled "An act to regulate gifts for charitable purposes," it is enacted that no such gift, when valid in other respects under the law of this state, shall be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries in the instrument creating the same; that in such cases, when a trustee is named, the title shall vest in him, and, if no person is named as trustee, then the title shall vest in the Supreme Court, and in all cases of bequests to charitable uses, where the beneficiaries are not definitely designated, that court shall have full control, and it shall be the duty of the Attorney General to enforce the trust, and represent the beneficiaries. This statute indicates an intention on the part of the Legislature to enforce and uphold charitable bequests not heretofore recognized as valid, and it may be regarded as the first step in the direction of modifying that body of law which this court has built up on the ruins of the system outlined in Williams v. Williams, 8 N. Y. 525. The result which the Second Division of this court was constrained to reach in a recent case of public importance, no doubt, had some influence in creating the sentiment which is embodied in the law. Tilden v. Green, 130 N. Y. 29, 28 N. E. 880, 14 L. R. A. 33, 27 Am. St. Rep. 487.

It seems to be assumed on the part of the respondents that these statutes can have no application to this case, inasmuch as they were not enacted until after the testator's death. That would be so, had the property vested otherwise than for the purpose of founding the home; but, as it did not under the law of the domicile, it could not under the

law of the forum. When a court of equity obtains jurisdiction, and all the facts are before it by supplemental pleading, as they are here, it may, and generally does, adapt the relief to the situation existing at the close of the litigation. Peck v. Goodberlett, 109 N. Y. 181, 16 N. E. 350; Madison Ave. Baptist Church v. Oliver St. Baptist Church, 73 N. Y. 83.

The case turned in the court below upon views of public policy with respect to the enforcement of the donor's will, but what that policy actually is should be determined by the situation existing at the time the court is required to make its decree disposing of the fund, and the statutes referred to have an important bearing upon that question. * * *

The judgment should be reversed, and final judgment directed in favor of the Sevilla Home for Children, with costs to all parties, as awarded by the court below, and to the plaintiffs in this court, payable out of the fund. All concur. Judgment accordingly.[21]

SECTION 3.—EXECUTION OF POWERS IN A WILL.

In re PRICE.

(Chancery Division, 1900. 1 Ch. Div. 442, 69 L. J. Ch. 225.)

An Englishwoman, Elizabeth Price, bequeathed the income of £2,000. to Mary Gay, a French subject domiciled in France, and the principal sum after her death to the person whom Mary Gay should by her last will appoint. After the death of her first husband, Mary Gay married Auguste Dié Forfillier, also a French subject domiciled in France. In 1887 she made a holograph will, in French form and unattested, valid according to French law, in which she disposed of all the property she might have at the time of her death in favor of her husband. The will did not conform to sections 9 and 10 of the English wills act, since it had not been attested by two or more witnesses.[22]

STIRLING, J. Under the will of Lady Price the fund is to be paid and transferred in such manner as Madame Forfillier "shall by her last will appoint." The first question arises as to the word "will" which there occurs—whether it means any instrument recognised by the law of England as a will or a will executed in accordance with the law of England. I shall first consider the three authorities which have been cited to me as bearing on this subject. The first is the case

[21] See J. H. Beale, Jr., Equitable Interests in Foreign Property, 20 Harv. Law Rev. 382–397.

[22] This statement of facts has been substituted for that of the original report.

of D'Huart v. Harkness, 34 Beav. 324. There, under the will of an English lady, a sum of Consols was held upon trust for her daughter for her separate use for life, and after her decease upon trust for such persons as her said daughter "by her last will and testament in writing duly executed" should direct or appoint. The daughter was an Englishwoman by birth, but she married a domiciled Frenchman and resided in France till her death; she made a will, which was not attested, whereby she bequeathed the sum of Consols to her husband. This will was valid by the law of France and had been admitted to probate in this country. It was held by Lord Romilly that the will was a valid execution of the power. It will be observed that, as regards the facts, that case is as near to the present case as one case can be to another. The material portion of the judgment is this (34 Beav. 327): "A sum of money is given simply, to such person as the Baroness shall by her last will duly executed appoint. What does that mean? It means a will so executed as to be good according to the English law. Here it is admitted to probate, and that is conclusive that it is good according to the English law. The English law admits two classes of wills to probate, first, those which follow the forms required by St. 1 Vict. c. 26, § 9, and secondly, those executed by a person domiciled in a foreign country, according to the law of that country, which latter are perfectly valid in this country. Accordingly, where a person domiciled in France executes a will in the mode required by the law of that country, it is admitted to proof in England, though the English formalities have not been observed. When a person simply directs that a sum of money shall be held subject to a power of appointment by will, he does not mean any one particular form of will recognised by the law of this country, but any will which is entitled to probate here. A power to appoint by will, simply, may be executed by any will which according to the law of this country is valid, though it does not follow the forms of the statute."

The next case is that of In re Kirwan's Trusts, 25 Ch. D. 373, which came before Kay, L. J., when a judge of first instance. The facts of that case require some attention. The power there was by deed or will to be executed in the presence of two or more witnesses to appoint amongst children. The donee of the power was an English subject. His testamentary disposition consisted of two instruments—first, a will executed in accordance with English law, but invalid according to French law, and secondly, a codicil not executed in accordance with English law, but valid according to the law of France. In order to have both will and codicil proved here, it was necessary to have recourse to Lord Kingsdown's act, and the will and codicil, which together made the testamentary disposition, were admitted to probate by virtue of that statute. Now, the instrument which purported to execute the power was the codicil, which was unattested, and, consequently, was not an instrument falling within the terms of

the power. Neither did it satisfy the requirements of the wills act. Upon that Kay, J., says (25 Ch. D. 379): "Now, the codicil was not attested, and therefore it did not fulfil the requisites either of the power or of the wills act (St. 1 Vict. c. 26), but it was a good testamentary document under St. 24 & 25 Vict. c. 114. * * * This being a good testamentary instrument by the law of the domicile of George Saint Lo Kirwan, which I understand was France at the time, although not executed as required by the wills act, has under the act which I have referred to been admitted to probate in England, and the documents admitted to probate are two, i. e., the will of the 3d April, 1862, and the codicil of the 9th of May, 1871." Then, after considering the effect of that, he goes on to say, (25 Ch. D. 381): "It is a good testamentary instrument, and its only defect is its want of attestation. But the wills act says that 'no appointment made by will in exercise of any power shall be valid unless the same be executed in manner hereinbefore required,' that is to say, in the presence of and attested by two witnesses. The later act (St. 24 & 25 Vict. c. 114) does not refer to that clause, nor, indeed, does it refer to a power of appointment at all. It only does this. It makes a will executed abroad by a British subject a good will if it be such a document as is recognised as a will by the law of that place. But it does not at all touch or interfere with the negative provision in the wills act, namely, that no testamentary appointment can be made unless it is attested by two witnesses. Therefore, I do not think it would be possible to treat this codicil as being a good and valid appointment either at law or in equity." Now, I pause there to remark that the facts of that case are different from those of the present case in two respects: First, the power was of a different kind, and secondly, the testamentary disposition was admitted to probate only by virtue of Lord Kingsdown's act, whereas here Lord Kingsdown's act does not come into operation. Unfortunately, D'Huart v. Harkness, 34 Beav. 324, was not cited in Re Kirwan's Trusts, 25 Ch. D. 373, and I have not the benefit of any observations of Kay, J., upon it, but it has been considered by Kekewich, J., in the recent case of Hummel v. Hummel, [1898] 1 Ch. 642. The facts stated in the headnote are as follows: "A daughter of a testator had under his will a general power of appointment by will over a share of his residuary estate. The daughter died in France, having while residing there made a disposition of her property by a writing signed by her but not attested, the writing being in form a valid will according to French law"—and it was held that the writing, even if admissible to probate under section 1 of Lord Kingsdown's act, did not operate as an execution by the daughter of her general power of appointment by will, since it had not been attested by two or more witnesses as required by sections 9 and 10 of the wills act. The question which I have to decide really did not arise there, because the document relied on as an execution of the power had not been admitted to probate; but Kekewich, J.,

does consider the question whether, supposing it could be proved, it would be a good execution of the power, and he proceeds on the footing that the will could only be proved under Lord Kingsdown's act. He says this ([1898] 1 Ch. 645): "It is, I will assume, * * * a valid will according to the law of France; but it is not a will that could under the provisions of the wills act be proved in this country. The question is, Can it operate as an exercise of a general power of appointment by will? As to that, the decision of Kay, J., in Re Kirwan's Trusts, 25 Ch. D. 373, is conclusive that it cannot, even if it had been a will that could be proved in this country. Is that decision inconsistent with D'Huart v. Harkness, 34 Beav. 324, where Sir J. Romilly, M. R., decided that a power to appoint 'by a will duly executed' is well exercised by a will good according to the law of the country of the testator's domicile, though ill executed according to the law of England? That case, as already mentioned, was not referred to in Re Kirwan's Trusts, 25 Ch. D. 373, but the latter is cited in a note on page 308 of 1 Williams on Executors (9th Ed.), as the authority for the proposition that in the case of a will which is only valid by reason of Act 24 & 25 Vict. c. 114, sections 9 and 10 of the wills act must be complied with. That appears to me to form the distinction between the two cases." Then he refers to Lord Kingsdown's act. The opinion there expressed by the learned judge appears to me to be that D'Huart v. Harkness, 34 Beav. 324, was not inconsistent with In re Kirwan's Trusts, 25 Ch. D. 373, upon the ground that the latter decision only applied to a case in which the will was proved under the provisions of Lord Kingsdown's act. That Act only applies to the wills of British subjects. Madame Forfillier was not a British subject but a French subject, and as a matter of fact the grant of letters of administration with the will annexed was not under Lord Kingsdown's act at all. Therefore, looking at the authorities and having regard to the view taken by Kekewich J., I am of opinion that I ought to follow D'Huart v. Harkness, 34 Beav. 324, and not In re Kirwan's Trusts, 25 Ch. D. 373. But I go further. I think that on principle D'Huart v. Harkness, 34 Beav. 324, was well decided. The general rule on the subject is, as stated by Mr. Dicey (Conflict of Laws, p. 684), that "any will of movables which is valid according to the law of the testator's domicile at the time of his death is valid" in England. It follows that the provisions of an English statute prescribing formalities with reference to wills do not apply to the wills of persons not domiciled in England.

In Bremer v. Freeman, 10 Moo. P. C. 306, it appears to have been contended that the provisions of section 20 of the wills act as to the revocation of wills applied to the wills of persons domiciled abroad. Lord Wensleydale in delivering the judgment of the court said that for reasons referred to by him it was unnecessary to consider the point, but added (10 Moo. P. C. 359): "Their Lordships, however, do not wish to intimate any doubt that the law of the domicile at the

time of the death is the governing law (see Story, Conflict of Laws, § 473), nor any that St. 7 Wm. IV & 1 Vict. c. 26, applies only to wills of those persons who continue to have an English domicile, and are consequently regulated by the English law."

Section 9 of the wills act prescribed that "no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned." Notwithstanding this language, it is the practice of the Probate Division, on the principle just stated, to admit to probate or otherwise recognise as valid the wills of persons domiciled abroad, although not executed as prescribed by the act. The present case affords an instance of this being done. I fail to see why the provisions of section 10 of the wills act should apply to the will of Madame Forfillier any more than those of section 9.

There is, however, a series of cases referred to in the argument which seems to establish that a will purporting to be made in execution of a power is valid if it satisfies the requirements of the instrument creating the power, although it would be invalid according to the law of the domicile of the testator at the time of his death. See In the Goods of Alexander, 29 L. J. (P. M. & A.) 93; In the Goods of Hallyburton, L. R. 1 P. & M. 90; In the Goods of Huber, [1896] P. 209. These cases, however, do not lay down that a power to appoint by will (without special formalities) conferred on a person domiciled abroad cannot be executed by a will valid by the law of the domicile of the donee of the power at the time of his death, and consequently do not appear to me to affect the decision of the present case.

In the view which I take I am not concerned to deal with In re Kirwan's Trusts, 25 Ch. D. 373, which is distinguishable in its facts from the present case; but I may say that the decision in that case may be rested on these grounds. First, the power was required to be executed by an instrument in a special form which the instrument said to be an execution of the power did not satisfy. Secondly, the wills act had no application, inasmuch as the testator was domiciled abroad; and although the instrument was not invalidated by the prohibitory portion of section 10, it did not derive validity from the enabling portion of that section. In any case the instrument did not satisfy the requirements of the wills act. Thirdly, although the instrument was valid by Lord Kingsdown's act, still, as was pointed out by Kay, J., that statute does not contain any enactment dealing with wills made in exercise of powers. Although some of the language used by that learned judge may be susceptible of a different interpretation, I am not sure that he intended to decide anything inconsistent with the principle I have stated.

In my opinion, therefore, it was competent for Madame Forfillier to exercise the power conferred on her by Lady Price's will by such a will as has been recognised by the Probate Division. It remains to be considered whether she has done so. This question is one of construction.

In general a will is to be construed according to the law of the domicile of the testator; "but this is a mere canon of interpretation, which should not be adhered to when there is any reason, from the nature of the will, or otherwise, to suppose that the testator wrote it with reference to the law of some other country." Dicey, Conflict of Laws, p. 695. Considering first the law of France, according to which prima facie the will is to be construed, the evidence shews that the will of Madame Forfillier is a complete disposition of all the property which she could dispose of; but it also appears that the mode of disposition by appointment is not practised in France, and that if a French court had to consider the effect of the will in this respect it would apply the English law. It is contended with regard to the law of England that the provisions of the wills act, including section 27, are inapplicable, and that consequently the law of England applicable is the law as it existed before that act, and that, there being no reference in the will either to the power or to the property, it is not a good execution of the power. If I am to apply the law as it existed before the wills act, questions of difficulty might arise; but it appears to me that I can decide this case upon another ground. The testatrix says: "I declare that this will annuls all the others * * * and that it shall thus be considered in England the same as in France." I think that that amounts to a declaration by the testatrix that she meant the will to operate as her last will in England as well as in France. I think it is indicated upon the face of the will that she wrote it with reference to the law of England as well as the law of France. Therefore I think that I am entitled to apply the rules of construction which would by English law be applied to a will expressed in the same terms and of the same date as that annexed to the letters of administration, including the rule of construction introduced by section 27 of the wills act.

No question arises between Monsieur Forfillier and the daughter of his wife by her first marriage, who by the law of France might have a claim if this fund had been part of Madame Forfillier's property; for she appears and supports the claim of Monsieur Forfillier.

In my opinion, therefore, the husband, Monsieur Forfillier, is entitled to the fund.

COTTING v. DE SARTIGES.

(Supreme Court of Rhode Island, 1892. 17 R. I. 668, 24 Atl. 530, 16 L. R. A. 367.)

Bill in equity for instructions and for the administration of a trust.

STINESS, J.[23] The complainant, trustee under the will of Mary M. Bourne, late of Newport, deceased, brings this bill, practically a bill

[23] A part of the opinion, discussing the law of Rhode Island on the execution of powers in a will, has been omitted.

for instructions, for the distribution of the trust fund, and the case is submitted on bill, answer, and proofs. The will was dated September 30, 1879, and admitted to probate in Newport, January 16, 1882. The testatrix bequeathed one sixth of her residuary estate to the complainant in trust for the benefit of her grandson Charles Allen Thorndike Rice during his life, and upon his decease to transfer and pay over the same to his issue, if he should leave any, as he should appoint "by will, or instrument in the nature thereof, executed in the presence of three or more witnesses; and, if he leaves no issue, to and among such persons, and upon such uses and trusts, as he shall so appoint;" and, in default of such appointment and issue, to and among those who should then be her heirs at law. The grandson died in New York, May 16, 1889, without issue, leaving a will executed in England, September 17, 1881, which was duly probated in New York, where he was domiciled at his death. The will did not specifically dispose of the trust fund, which was subject to Mr. Rice's appointment, nor make any mention of it. The complainant is both trustee under the will of Mrs. Bourne and executor of the will of Mr. Rice. In the latter capacity he claims the right to receive and distribute the fund, as one which passes by appointment to the legatees under Rice's will. On the other hand, the heirs of Mrs. Bourne contend that there is a default of appointment, and so, under her will, the fund goes to them. The issue now raised, therefore, is whether there has been an execution of the power by the general residuary clause of Mr. Rice's will. Upon this issue our first inquiry must be by what law the execution of the power is to be determined. It is admitted that both in England, where the will was executed, and in New York, where the donee of the power was domiciled, there are statutory provisions to the effect that a general devise or bequest will include property over which the testator has power of appointment, and will operate as an execution of such power, unless an intention not to execute the power shall appear by the will. If, therefore, the question is to be determined either by the law of England or New York, the power has been executed. Clearly, the mere accident that Mr. Rice's will was executed in England while he was temporarily there awaiting a steamer cannot control its operation by impressing upon it the law of the place where it was made. It was neither the domicile of the testator, nor the situs of the property, nor the forum where the question comes for determination. Caufield v. Sullivan, 85 N. Y. 153. The property in dispute being personal property, which, strictly speaking, has no situs, the question must be decided by the law either of New York, the domicile of the donee of the power, or of this state, the domicile of the donor. The will is a Rhode Island will. It disposes of property belonging to a resident of Rhode Island. The trustee under the will is, in effect, a Rhode Island trustee, and jurisdiction over the trustee and the fund is here. The fund in question belonged to Mrs. Bourne, and never belonged to Mr. Rice. True, he had the income from it for life, and

power to dispose of it at death—practically the dominion of an owner—and yet it was not his.

The fund, then, being a Rhode Island fund, disposable under a Rhode Island will, it follows, naturally and necessarily, that the fact of its disposition must be determined by Rhode Island law. The question is not what intent is to be imputed to the will of Mr. Rice, but what intent is to be imputed to the will of Mrs. Bourne. She authorized a disposition of her property by an appointment, and it is under her will that the question arises whether an appointment has been made. Her will is to be adjudged by the law of her domicile. So far as assumptions of intent may be made, it is to be presumed she intended the appointment to be made according to the law of her domicile, and not by the law of New York or England, or any other place where the donee of the power might happen to live. It is not the fact of Mrs. Bourne's ownership of the property which points to the law of this state as the criterion, but the fact that her will is the controlling instrument in the disposition of the property. Precisely this question arose in Sewall v. Wilmer, 132 Mass. 131, where Judge Gray remarked that the question is singularly free of direct authority. In that case a Massachusetts testator gave to his daughter a power of appointment of certain property. The daughter lived in Maryland, where she died leaving a will devising all her property to her husband, but making no mention of the power. In Massachusetts this was an execution of the power, but in Maryland it was not; and the question arose, which law should govern? It was held that the will of the father was the controlling instrument, and hence that the law of his domicile was to apply. The same decision was made in Bingham's Appeal, 64 Pa. 345, which is cited in Sewall v. Wilmer with approval. In England, also, it has been held that the validity of the execution of a power is to be determined by the law of the domicile of the donor of the power. Tatnall v. Hankey, 2 Moore, P. C. 342; In re Alexander, 6 Jur. (N. S.) 354. The principle on which these cases proceed is that to which we have already alluded, viz., that the appointer is merely the instrument by whom the original testator designates the beneficiary, and the appointee takes under the original will, and not from the donee of the power. The law of the domicile of the original testator is therefore the appropriate test of an execution of a power. The case of D'Huart v. Harkness, 34 Beav. 324, 328, apparently holds the contrary, but, we think, only apparently. In that case property was held under an English will, with power of appointment, by will, in a woman domiciled in France. She died leaving a holograph, which was valid as a will in France, but not in England. Under the wills act, it was admitted to probate in England, as a foreign will, which gave it all the validity of an English will. The probate in England was held to be conclusive that it was a good will, according to English law; and, being a will, it executed power. The case was really decided by the law of England. While there are

numerous decisions upon the general rule that a will is to be governed by the law of the testator's domicile, such decisions are not to be confounded with the present question—which testator is the one to be considered in the case of a testamentary power? We know of no case which applies the law of the domicile of the donee of the power without reference to that of the donor. For these reasons we think the law of the domicile of the donor of the power should control, and hence that the law of Rhode Island must govern in this case. * * *[24]

[24] See, also, In re d'Estes Settlement Trusts, [1903] 1 Ch. 898; In re Scholefield, [1905] 2 Ch. 408; Minor, Conflict of Laws, § 150.

PROBATE.—A probate proceeding, being in the nature of a proceeding in rem, will be binding only if the court admitting a will to probate had jurisdiction over the res. Hence the probate of a will at the last domicile of the testator will, in the absence of statute, not be evidence of title, nor have any effect upon foreign land. Robertson v. Pickrell, 109 U. S. 608, 3 Sup. Ct. 407, 27 L. Ed. 1049 (1883); M'Cormick v. Sullivant, 10 Wheat. 193, 3 L. Ed. 300 (1825).

A will of personalty may be proved in any jurisdiction where there is property of the deceased. Gordon's Case, 50 N. J. Eq. 397, 26 Atl. 268 (1893). But if it is admitted to probate in a jurisdiction other than that of the last domicile of the testator, it has been held by the courts of the domicile that, in the absence of statute, it will be recognized only with respect to property within the foreign jurisdiction. Walton v. Hall's Estate, 66 Vt. 455, 29 Atl. 803 (1894); Newcomb v. Newcomb, 108 Ky. 582, 57 S. W. 2, 51 L. R. A. 419 (1900). See, also, Bowen v. Johnson, 5 R. I. 112, 73 Am. Dec. 49 (1858); In re Clark's Estate, 148 Cal. 108, 82 Pac. 760, 1 L. R. A. (N. S.) 996, 113 Am. St. Rep. 197 (1905).

The courts of the last domicile of the deceased are regarded as the courts of primary jurisdiction with respect to wills of personalty. Enohin v. Wylie, 10 H. L. Cas. 1 (1862); Pratt v. Douglas, 38 N. J. Eq. 516 (1884). Probate granted within such jurisdiction will be recognized by the courts of the other states. Goodman v. Winter, 64 Ala. 410, 38 Am. Rep. 13 (1879); Succession of Gaines, 45 La. Ann. 1237, 14 South. 233 (1893); Martin v. Stovall, 103 Tenn. 1, 52 S. W. 296, 48 L. R. A. 130 (1899). So as to a title adjudicated upon by the courts of the domicile. Crispin v. Doglioni, 1863, 3 S. & T. 96; In re Trufort, L. R. 36 Ch. D. 600 (1887). But see Kerr v. Moon, 9 Wheat. 565, 6 L. Ed. 161 (1824). So as to construction placed upon the will by such court. Ford v. Ford, 80 Mich. 42, 44 N. W. 1057 (1890); Smith v. Central Trust Co., 154 N. Y. 333, 48 N. E. 553 (1897).

A finding by the probate court that the testator was domiciled within the jurisdiction of the state, and a recital thereof in the decree admitting the will to probate, will not be binding upon the courts of another state. Overby v. Gordon, 177 U. S. 214, 20 Sup. Ct. 603, 44 L. Ed. 741 (1900).

By statute, wills proved in one state, with the probate thereof duly authenticated, may be admitted to probate in another jurisdiction. Crippen v. Dexter, 13 Gray (Mass.) 330 (1859); Evansville, etc., Co. v. Winsor, 148 Ind. 682, 48 N. E. 592 (1897). See, also, 115 Am. St. Rep. 518–522.

As to conclusiveness of probate as res judicata see, in general, 21 L. R. A. 680–689. As to effect of probate of a will in another state, see 48 L. R. A. 130–153.

As to succession tax, see Matter of Estate of Swift, 137 N. Y. 77, 32 N. E. 1096, 18 L. R. A. 709 (1893); Matter of Houdayer, 150 N. Y. 37, 44 N. E. 718, 34 L. R. A. 235, 55 Am. St. Rep. 642 (1896); Blackstone v. Miller, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. Ed. 439 (1903); Matter of Clinch, 180 N. Y. 300, 73 N. E. 35 (1905); Matter of Gordon, 186 N. Y. 471, 79 N. E. 722, 10 L. R. A. (N. S.) 1089 (1906); Matter of Ramsdill, 190 N. Y. 492, 83 N. E. 584 (1908). See, also, Stern v. Queen, [1896] 1 Q. B. 211; 8 Col. L. Rev. 398.

CONTINENTAL LAW.—1. *Intestate Succession.—France.*—Succession to immovables is governed by the law of their situs. Article 3, Civ. Code; Cass. Jan. 26, 1892 (D. 1892, 1, 497), and note by A. Pic. Subject, however, to renvoi. App. Aix, July 19, 1906 (4 Darras, 805). The movable property of a deceased foreigner will be distributed in accordance with French law, if

the decedent had an authorized domicile in France. In the absence of such authorized domicile, his national law will govern. Cass. May 5, 1875 (S. 1875, 1, 409); App. Paris, Aug. 1, 1905 (D. 1906, 2, 169). Subject to renvoi. Cass. June 24, 1878 (D. 1879, 1, 56); Cass. Feb. 22, 1882 (S. 1882, 1, 393); App. Grenoble, March 31, 1908 (35 Clunet, 837). Contra, App. Pau, June 11, 1906 (D. 1907, 2, 1).

See, also, note, 4 Darras, 813.

Germany.—The national law of the deceased applies with respect to both realty and personalty (article 24, par. 1, and article 25, Law Intr. Civ. Code); subject, however, to renvoi (article 27). If a German dies domiciled in a foreign country, his heirs may claim the benefit of such foreign law with respect to their liability for the debts of the deceased. Article 24, par. 2, Law Intr. Civ. Code. On the other hand, if a foreigner dies domiciled in Germany, a German may claim rights in the estate, which are based solely on German law, unless, under the law of the state of which the decedent was a subject, German law is held to apply exclusively to the succession of a German domiciled in such state. Article 25, Law Intr. Civ. Code.

Article 24, par. 1, and article 25, Law Intr. Civ. Code, do not apply to property situated in a state under whose law special rules apply. Article 28, Law Intr. Civ. Code. As to immovables, see, also, R. G. May 31, 1906 (35 Clunet, 193).

Italy.—The national law of the deceased will govern the devolution of both movable and immovable property. Article 8, Prel. Disp. Civ. Code; App. Genoa, March 16, 1887 (La Legge, 1887, 2, 310); App. Milan, March 21, 1905 (33 Clunet, 1236). The national law is applied by some courts also to immovables situated in a country under whose law the lex rei sitæ is held to govern the succession to realty. Cass. Turin, Feb. 20, 1905 (34 Clunet, 509); Trib. Civ. Caltanissetta, March 27, 1891 (20 Clunet, 955); Cass. Turin, Dec. 20, 1905 (35 Clunet, 910). Others, by reason of their inability to enforce their decree under the circumstances, will follow the law of the situs. Cass. Turin, June 17, 1874 (Monitore 1874, p. 894); Cass. Palermo, Aug. 25, 1894 (S. 1895, 4, 28) and note.

2. *Testamentary Succession.*—a. *Capacity.—France.* The national law of the testator applies to wills relating to both movables and immovables. App. Paris, Aug. 10, 1872 (1 Clunet, 128), semble. *Germany.*—Articles 7, 24, Law Intr. Civ. Code. *Italy.*—Article 6, Prel. Disp. Civ. Code. It is sometimes difficult to determine whether a matter relates to capacity or to form. See French Cass. Apr. 2, 1884 (S. 1886, 1, 121), and note; Cass. Florence, Nov. 12, 1897 (Monitore 1898, 245).

b. *Form.*—The rule "locus regit actum" applies to wills of both movable and immovable property. *France.*—Trib. Civ. Seine, Dec. 23, 1881 (9 Clunet, 322). *Italy.*—Article 9, Prel. Disp. Civ. Code; Cass. Turin May 31, 1881 (Monitore 1881, p. 673). *Germany.*—Articles 11, 24, Law Intr. Civ. Code.

It has been held, however, that such a will will not stand in the face of an express statute existing under the national law of the testator. Cass. Turin, April 12, 1892 (Monitore 1892, p. 346).

The rule "locus regit actum" is optional in Germany and Italy, the testator being authorized to execute his will also in the form required by his national law. *Germany.*—Articles 11, 24, Law Intr. Civ. Code. *Italy.*—Article 9, Prel. Disp. Civ. Code. In France the rule seems to be optional for Frenchmen executing wills abroad, article 999, Civ. Code, but imperative for foreigners executing wills in France, Cass. March 9, 1853 (D. 1853, 1, 217); App. Aix, July 11, 1881 (S. 1883, 2, 249), and note by J. E. Labbé; App. Paris, Dec. 2, 1898 (D. 1899, 2, 177) and note by Ch. Claro; App. Orléans, Feb. 24, 1904 (31 Clunet, 680).

In favor of optional character of the rule, permitting compliance with the formal requirements of the national law, Trib. Civ. Seine, June 28, 1895 (22 Clunet, 847); Trib. Civ. Rouen, July 22, 1896; App. Rouen, May 7, 1898 (26 Clunet, 578). See, also, note by E. Naquet to Cass. July 29, 1901 (S. 1903, 1, 73).

c. *Substantive Provisions.—France.*—The rules governing the devolution of property upon intestacy apply here. Cass. Jan. 26, 1892 (D. 1892, 1, 497), and note by P. Pic.; Cass. April 2, 1884 (S. 1886, 1, 121) and note; App. Pau, June 11, 1906 (D. 1907, 2, 1). Subject, however, to acquired rights upon a

change of nationality or otherwise. App. Paris, Jan. 7, 1870 (S. 1870, 2, 97); Cass. Jan. 31, 1832 (S. 1832, 1, 220). Subject, also, to the rules concerning public order. Cass. Jan. 24, 1899 (D. 1900, 1, 533). See, also, L. Renault, De la succession ab intestat des étrangers en France et des Français à l'étranger, 2 Clunet, 329–345, 422–429, 3 Clunet, 15–22.

Germany.—The national law governs both as to movables and immovables. Article 24, Law Intr. Civ. Code. Subject, however, to renvoi. Article 27, Law Intr. Civ. Code. Such law is not applicable to property situated in a state where special rules prevail. Article 28, Law Intr. Civ. Code. See, in this connection, article 59, Law Intr. Civ. Code.

Consult, also, C. Barazetti, Zur Erläuterung des Art. 24 Abs. 3 des Einführungsgesetzes zum bürgerlichen Gesetzbuche für das deutsche Reich, 7 Niemeyer, 1–7; J. Keidel, Le droit international privé dans le nouveau Code Civil Allemand, 26 Clunet, 260–275; P. Klein, Zur Auslegung des Art. 24 des E. G. zum deutschen bürgerlichen Gesetzbuche, 12 Niemeyer, 444–446; P. Klein, Haben die deutschen Vorschriften über Pflichtteilsrecht und Erbunwürdigkeit für das internationale Privatrecht einen zwingenden Character? 13 Niemeyer, 87–91.

Italy.—The national law governs with respect to both movables and immovables. Article 9, Prel. Disp. Civ. Code. See, also, P. Esperson, Le droit international privé dans la législation italienne, 8 Clunet, 216–230; P. Fiore, De la succession des étrangers en Italie, 30 Clunet, 42–70.

In regard to successions and wills, see, also, Draft of Convention, signed at the Hague July 17, 1905, Appendix B, I, and, in general, G. Diena, De l'influence que peut exercer sur la validité d'une substitution un changement de nationalité du grevé, 21 Clunet, 255–264; A. Lainé, De la forme du testament privé en droit international, 3 Darras, 833–896; F. Surville, La règle "locus regit actum" et le testament, 33 Clunet, 961–976.

CHAPTER V.

FOREIGN ADMINISTRATIONS.

SECTION 1.—EXECUTORS AND ADMINISTRATORS.

VAUGHAN v. NORTHUP.

(Supreme Court of the United States, 1841. 15 Pet. 1, 10 L. Ed. 639.)

STORY, J.[1] This is an appeal from a decree of the circuit court of the District of Columbia, sitting for the county of Washington, dismissing a bill in equity, brought by the appellants against the appellees. The facts, so far as they are necessary to be stated upon the present occasion, are: That one James Moody, an inhabitant of Kentucky, died in that state, about the year 1802, intestate, without leaving any children; that in May or June, 1833, the defendant, Northrup, obtained letters of administration upon his estate, from the proper court of Jefferson county, in Kentucky, and afterwards, under and in virtue of those letters of administration, he received from the treasury of the United States the sum of $5,215.56, for money due to the intestate, or his representatives, for military services rendered during the Revolutionary War. The present bill was brought by the appellants, claiming to be the next of kin and heirs of the intestate, for their distributive shares of the said money, against Northup, as administrator; and the other defendants, who are made parties, are asserted to be adverse claimants, as next of kin and distributees. At the hearing of the cause in the court below, the same having been set down for argument upon the answer of Northup, denying the jurisdiction of the court, the bill was ordered to be dismissed for want of jurisdiction; and from that decree, the present appeal has been taken.

Under these circumstances, the question is broadly presented, whether an administrator, appointed and deriving his authority from another state, is liable to be sued here, in his official character, for assets lawfully received by him, under and in virtue of his original letters of administration. We are of opinion, both upon principle and authority, that he is not. Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which grants it; and does not, de jure, extend to other countries. It cannot confer, as a matter of right, any authority to collect assets

[1] A part of the opinion has been omitted.

of the deceased, in any other state; and whatever operation is allowed to it beyond the original territory of the grant, is a mere matter of comity, which every nation is at liberty to yield or to withhold, according to its own policy and pleasure, with reference to its own institutions and the interests of its own citizens. On the other hand, the administrator is exclusively bound to account for all the assets which he received, under and in virtue of his administration, to the proper tribunals of the government from which he derives his authority; and the tribunals of other states have no right to interfere with or to control the application of those assets according to the lex loci. Hence, it has become an established doctrine, that an administrator, appointed in one state, cannot, in his official capacity, sue for any debts due to his intestate, in the courts of another state; and that he is not liable to be sued in that capacity, in the courts of the latter, by any creditor, for any debts due there by his intestate. The authorities to this effect are exceedingly numerous, both in England and America; but it seems to us unnecessary, in the present state of the law, to do more than to refer to the leading principle as recognized by this court, in Fenwick v. Sears, 1 Cranch, 259, 2 L. Ed. 101, Dixon's Executors v. Ramsay's Executors, 3 Cranch, 319, 2 L. Ed. 453, and Kerr v. Moon, 9 Wheat. 565, 6 L. Ed. 161.

[In the remaining portion of the opinion the court held that debts due from the government of the United States have no locality at the seat of government, and that Act Cong. June 24, 1812, c. 106, 2 Stat. 755, did not authorize the maintenance of the suit.][2]

JOHNSON v. POWERS.

(Supreme Court of the United States, 1891. 139 U. S. 156, 11 Sup. Ct. 525, 35 L. Ed. 112.)

GRAY, J. This is a bill in equity filed in the Circuit Court of the United States for the Northern District of New York by George K. Johnson, a citizen of Michigan, in behalf of himself and of all other persons interested in the administration of the assets of Nelson P. Stewart, late of Detroit, in the county of Wayne and state of Michigan, against several persons, citizens of New York, alleged to hold real estate in New York under conveyances made by Stewart in fraud of

[2] See, in general, 45 Am. St. Rep. 664–674.

Nor will submission on the part of the administrator to the jurisdiction of the foreign court give extraterritorial effect to the decree. Judy v. Kelley, 11 Ill. 211, 50 Am. Dec. 455 (1849); Jefferson v. Beall, 117 Ala. 436, 23 South. 44, 67 Am. St. Rep. 177 (1898); Greer v. Ferguson, 56 Ark. 324, 19 S. W. 966 (1892). But see Davis v. Connelly's Executors, 4 B. Mon. (Ky.) 136 (1843).

It has been held that in the absence of statute a foreign administrator cannot sue, even if there are no local creditors. Mansfield v. McFarland, 202 Pa. 173, 51 Atl. 763 (1902).

his creditors. The bill is founded upon the jurisdiction in equity of the Circuit Court of the United States, independent of statutes or practice in any state, to administer, as between citizens of different states, any deceased person's assets within its jurisdiction. Payne v. Hook, 7 Wall. 425, 19 L. Ed. 260; Kennedy v. Creswell, 101 U. S. 641, 25 L. Ed. 1075. At the threshold of the case we are met by the question whether the plaintiff shows such an interest in Stewart's estate as to be entitled to invoke the exercise of this jurisdiction. He seeks to maintain his bill both as administrator and as a creditor in behalf of himself and all other creditors of Stewart. The only evidence that he was either administrator or creditor is a duly certified copy of a record of the probate court of the county of Wayne and state of Michigan, showing his appointment by that court as administrator of Stewart's estate; the subsequent appointment by that court, pursuant to the statutes of Michigan, of commissioners to receive, examine, and adjust all claims of creditors against the estate; and the report of those commissioners, allowing several claims, including one to this plaintiff, "George K. Johnson, for judgments against claimant in Wayne circuit court as indorser," and naming him, as administrator, as the party objecting to the allowance of all the claims. The plaintiff certainly cannot maintain this bill as administrator of Stewart, even if the bill can be construed as framed in that aspect, because he admits that he has never taken out letters of administration in New York; and the letters of administration granted to him in Michigan confer no power beyond the limits of that state, and cannot authorize him to maintain any suit in the courts, either state or national, held in any other state. Stacy v. Thrasher, 6 How. 44, 58, 12 L. Ed. 337; Noonan v. Bradley, 9 Wall. 394, 19 L. Ed. 757.

The question remains whether, as against these defendants, the plaintiff has proved himself to be a creditor of Stewart. The only evidence on this point, as already observed, is the record of the proceedings before commissioners appointed by the probate court in Michigan. It becomes necessary, therefore, to consider the nature and the effect of those proceedings. They were had under the provisions of the General Statutes of Michigan (2 How. Ann. St. §§ 5888–5906), "the general idea" of which, as stated by Judge Cooley, "is that all claims against the estates of deceased persons shall be duly proved before commissioners appointed to hear them, or before the probate court when no commissioners are appointed. The commissioners act judicially in the allowance of claims, and the administrator cannot bind the estate by admitting their correctness, but must leave them to be proved in the usual mode." Clark v. Davis, 32 Mich. 154, 157. The commissioners, when once appointed, become a special tribunal, which, for most purposes, is independent of the probate court, and from which either party may appeal to the circuit court of the county; and, as against an adverse claimant, the administrator, general or special,

represents the estate, both before the commissioners and upon the appeal. 2 How. Ann. St. §§ 5907–5917; Lothrop v. Conely, 39 Mich. 757. The decision of the commissioners, or of the circuit court on appeal, should properly be only an allowance or disallowance of the claim, and not in the form of a judgment at common law. La Roe v. Freeland, 8 Mich. 531. But, as between the parties to the controversy, and as to the payment of the claim out of the estate in the control of the probate court, it has the effect of a judgment, and cannot be collaterally impeached by either of those parties. Shurbun v. Hooper, 40 Mich. 503. Those statutes provide that, when the administrator declines to appeal from a decision of the commissioners, any person interested in the estate may appeal from that decision to the circuit court; and that, when a claim of the administrator against the estate is disallowed by the commissioners, and he appeals, he shall give notice of his appeal to all concerned by personal service or by publication. 2 How. Ann. St. §§ 5916, 5917. It may well be doubted whether, within the spirit and intent of these provisions, the administrator, when he is also the claimant, is not bound to give notice to other persons interested in the estate, in order that they may have an opportunity to contest his claim before the commissioners; and whether an allowance of his claim, as in this case, in the absence of any impartial representative of the estate, and of other persons interested therein, can be of any binding effect, even in Michigan. See Lothrop v. Conely, above cited. But we need not decide that point, because upon broader grounds it is quite clear that those proceedings are incompetent evidence in this suit and against these defendants that the plaintiff is a creditor of Stewart or of his estate. A judgment in rem binds only the property within the control of the court which rendered it, and a judgment in personam binds only the parties to that judgment, and those in privity with them. A judgment recovered against the administrator of a deceased person in one state is no evidence of debt in a subsequent suit by the same plaintiff in another state, either against an administrator, whether the same or a different person, appointed there, or against any other person having assets of the deceased. Aspden v. Nixon, 4 How. 467, 11 L. Ed. 1059; Stacy v. Thrasher, 6 How. 44, 12 L. Ed. 337; McLean v. Meek, 18 How. 16, 15 L. Ed. 277; Low v. Bartlett, 8 Allen (Mass.) 259. In Stacy v. Thrasher, in which a judgment recovered in one state against an administrator appointed in that state upon an alleged debt of the intestate was held to be incompetent evidence of the debt in a suit brought by the same plaintiff in the Circuit Court of the United States held within another state against an administrator there appointed of the same intestate, the reasons given by Mr. Justice Grier have so strong a bearing on the case before us, and on the argument of the appellant, as to be worth quoting from: "The administrator receives his authority from the ordinary or other officer of the government where the goods of the intestate

are situate; but, coming into such possession by succession to the intestate, and incumbered with the duty to pay his debts, he is considered in law as in privity with him, and therefore bound or estopped by a judgment against him. Yet his representation of his intestate is a qualified one, and extends not beyond the assets of which the ordinary had jurisdiction." 6 How. 58, 12 L. Ed. 337. In answering the objection that to apply these principles to a judgment obtained in another state of the Union would be to deny it the faith and credit and the effect to which it was entitled by the Constitution and laws of the United States, he observed that it was evidence, and conclusive by way of estoppel, only between the same parties or their privies, or on the same subject-matter when the proceeding was in rem, and that the parties to the judgments in question were not the same; neither were they privies, in blood, in law, or by estate; and proceeded as follows: "An administrator under grant of administration in one state stands in none of these relations to an administrator in another. Each is privy to the testator, and would be estopped by a judgment against him; but they have no privity with each other, in law or in estate. They receive their authority from different sovereignties, and over different property. The authority of each is paramount to the other. Each is accountable to the ordinary from whom he receives his authority. Nor does the one come by succession to the other into the trust of the same property, incumbered by the same debts." 6 How. 59, 60, 12 L. Ed. 337. "It is for those who assert this privity to show wherein it lies, and the argument for it seems to be this: That the judgment against the administrator is against the estate of the intestate, and that his estate, wheresoever situate, is liable to pay his debts. Therefore the plaintiff, having once established his claim against the estate by the judgment of a court, should not be called on to make proof of it again. This argument assumes that the judgment is in rem, and not in personam, or that the estate has a sort of corporate entity and unity. But this is not true, either in fact or in legal construction. The judgment is against the person of the administrator that he shall pay the debt of the intestate out of the funds committed to his care. If there be another administrator in another state, liable to pay the same debt, he may be subjected to a like judgment upon the same demand, but the assets in his hands cannot be affected by a judgment to which he is personally a stranger." "The laws and courts of a state can only affect persons and things within their jurisdiction. Consequently, both as to the administrator and the property confided to him, a judgment in another state is res inter alios acta. It cannot be even prima facie evidence of a debt; for, if it have any effect at all, it must be as a judgment, and operate by way of estoppel." 6 How. 60, 61, 12 L. Ed. 337. In Low v. Bartlett, above cited, following the decisions of this court, it was held that a judgment allowing a claim against the estate of a deceased person in Vermont, under statutes similar

to those of Michigan, was not competent evidence of debt in a suit in equity brought in Massachusetts by the same plaintiff against an executor appointed there, and against legatees who had received money from him; the court saying: "The judgment in Vermont was in no sense a judgment against them, nor against the property which they had received from the executor." 8 Allen, 266. In the case at bar, the allowance of Johnson's claim by the commissioners appointed by the probate court in Michigan, giving it the utmost possible effect, faith, and credit, yet, if considered as a judgment in rem, bound only the assets within the jurisdiction of that court; and, considered as a judgment inter partes, bound only the parties to it and their privies. It was not a judgment against Stewart in his lifetime, nor against his estate, wherever it might be, but only against his assets and his administrator in Michigan. The only parties to the decision of the commissioners were Johnson in his personal capacity, as claimant, and Johnson in his representative capacity, as administrator of those assets, as defendant. The present defendants were not parties to that judgment, nor in privity with Johnson in either capacity. If any other claimant in those proceedings had been the plaintiff here, the allowance of his claim in Michigan would have been no evidence of any debt due to him from the deceased in this suit brought in New York to recover alleged property of the deceased in New York from third persons, none of whom were parties to those proceedings, or in privity with either party to them. The fact that this plaintiff was himself the only party on both sides of those proceedings cannot, to say the least, give the decision therein any greater effect against these defendants. The objection is not that the plaintiff cannot maintain this bill without first recovering judgment on his debt in New York, but that there is no evidence whatever of his debt, except the judgment in Michigan, and that that judgment, being res inter alios acta, is not competent evidence against these defendants. This objection being fatal to the maintenance of this bill, there is no occasion to consider the other questions, of law or of fact, mentioned in the opinion of circuit court, and discussed at the bar. Decree affirmed.[3]

[3] The dissenting opinion of Brown, J., has been omitted.

Contra, semble, as to executors. Hill v. Tucker, 13 How. (U. S.) 458, 14 L. Ed. 223 (1851); Goodall v. Tucker, 13 How. (U. S.) 469, 14 L. Ed. 227 (1851); Garland v. Garland, 84 Va. 181, 4 S. E. 334 (1887). Compare Carpenter v. Strange, 141 U. S. 87, 11 Sup. Ct. 960, 35 L. Ed. 640 (1891).

Accord: Johnston v. McKinnon, 129 Ala. 223, 29 South. 696 (1901); State v. Fulton (Tenn. Ch. App.) 49 S. W. 297 (1898). Nor is there privity between the executor and an administrator with the will annexed appointed in another state. Brown v. Fletcher, 210 U. S. 82, 28 Sup. Ct. 702, 52 L. Ed. 966 (1908).

For the same reason a judgment against an ancillary administrator in a suit brought by him is not a bar to a suit, founded on the same cause of action, brought by an ancillary administrator of the estate in another jurisdiction. Ingersoll v. Coram, 211 U. S. 335, 29 Sup. Ct. 92, 53 L. Ed. 208 (1908).

See, in general, 27 L. R. A. 101–117.

FALKE v. TERRY.

(Supreme Court of Colorado, 1903. 32 Colo. 85, 75 Pac. 425.)

CAMPBELL, C. J.[4] The material facts, as set forth in the complaint, are that plaintiffs are children and heirs at law of Juan B. C. Phillips, deceased. In 1892 their father died in the city of Brooklyn, N. Y., leaving a will, in which the defendant, Amanda L. Falke, formerly wife of Mr. Phillips, was named executrix, and John H. Springer executor. The will was duly presented for and admitted to probate in the surrogate's court of the city of Brooklyn, and letters testamentary issued to defendant as executrix (the executor not qualifying), and thereupon she took possession of all the property of the estate, and thereafter has had exclusive possession of it. No inventory of the assets of the estate was filed in the surrogate's court, and no accounting thereto by the executrix has ever been made. Soon after the testator's death the defendant married Henry Falke, and in the year 1894 removed with him to the state of Colorado, bringing with her funds and assets of the estate of great value. Their father's will, although it gave to the wife, the defendant herein, a life interest in all of the property, with the power to sell and dispose of the same, or any part thereof, as she deemed best, during such period of time, further provided that, in case she married again, his personal representatives should set apart and invest in the names of his children, including these plaintiffs, such parts of the estate as would have been theirs by law in case he died intestate, the same to become their absolute property when they respectively reached the age of 25 years. Disregarding the provisions of the will and her duty as executrix, the defendant denies the right of plaintiffs to any share of the estate of their father, although she married again after his death, and long before the action was begun, and has converted to her own use a large part of the property of the estate belonging to them, and holds the same in this state in fraud of their rights. There are other allegations of mistreatment of the plaintiffs by defendant, a denial of their legitimacy, and certain other allegations, which are not material to this decision. The court assumed jurisdiction of the cause, finding the issues in favor of the plaintiffs, adjudging title to certain real estate situate in the state of New York, standing in defendant's name upon the records, to be the property of the plaintiffs, and decreed that the same should be held by her in trust for them. The cause was then referred to a referee to take an accounting of defendant's acts and doings as executrix of the estate from the time she took possession and assumed control of the assets. The referee found that defendant was indebted to the plaintiffs in the sum of about $2,400, and his report was confirmed by the court, then presided over by a different judge from the one who

[4] A part of the opinion has been omitted.

ordered the accounting, and a personal judgment against the defendant was rendered for that sum in favor of plaintiffs. The defendant brings the case here by appeal.

1. The general doctrine is that executors and administrators are not liable to actions as such in a state where they have obtained no letters of administration, but that they are amenable for their executorial acts only to the proper tribunals of the state from which they obtained their appointment. The appellant insists that this doctrine applies to this case, and that the court is wholly without jurisdiction of the subject-matter. The general rule for which appellant contends is sustained by a large number of authorities, among which are Woodruff v. Young, 43 Mich. 548, 6 N. W. 85; Spoon v. Baxter, 31 Mich. 279; Story on Conflict of Laws (7th Ed.) § 514; 1 Woerner on The American Law of Administration (2d. Ed.) c. 17, and additional authorities therein cited. If this action were against the defendant, in her capacity as executrix, to enforce the performance of her official duty, it would not lie. Appellant misconceives the real scope of the action. It is based upon the proposition that a trust fund in the possession of a defendant has been improperly used, and is in danger of being still further misapplied, and the protection of the court is sought by the ones entitled thereto in order to protect it from loss. In his valuable work on the Conflict of Laws at section 514b, Judge Story declares that the doctrine is fully established that, if a foreign executor or administrator brings or transmits to another state property which he has received under administration abroad, or if he is personally present, he is not, either personally or in his representative capacity, liable to a suit in such other state. Several cases are cited in its support. Notwithstanding this opinion of the learned jurist, we think the principle upon which the jurisdiction of the court in this case rests has been firmly established by many respectable authorities. In the case of Tunstall v. Pollard's Adm'r, 11 Leigh (Va.) 1, in an able opinion by Tucker, P. J., in which he reviews and comments upon the authorities referred to by Judge Story, the conclusion was reached that an executor who has qualified and received assets in a foreign country and brought them into the state of Virginia is liable to be sued and to be compelled to account in her courts, though he never qualified as executor in Virginia, and may have received no assets there. In Hedenberg v. Hedenberg, 46 Conn. 30, 33 Am. Rep. 10, it was held that a foreign executor who comes into another state to reside, and brings with him property belonging to the estate, cannot be made liable in the latter state, upon suit of a local creditor of the testator, to the extent of the property brought therein, but may be to the extent of the property already there. This, in a measure, sustains the text of Judge Story. The leading case in America in support of the principle upon which jurisdiction herein can be maintained is McNamara v. Dwyer, 7 Paige (N. Y.) 239, 32 Am. Dec. 627. Others are Montalvan v. Clover, 32 Barb. (N. Y.) 190; Patton v. Overton, 27 Tenn.

192; Colbert v. Daniel, 32 Ala. 314; Dillard v. Harris, 2 Tenn. Ch. 196; Bryan v. McGee, 2 Wash. C. C. 337, Fed. Cas. No. 2,066; Spraddling v. Pipkin, 15 Mo. 118; Clopton v. Booker, 27 Ark. 482; McCabe v. Lewis, 76 Mo. 296. Other authorities are collected in 8 Enc. Pl. & Pr. 714 et seq.; Schouler's Executors & Administrators (2d Ed.) § 173; 1 Woerner's Amer. Law of Adm'n (2d Ed.) § 164. The complaint therefore stated a case within the jurisdiction of the district court.

It was necessary, however, for the plaintiffs, among other things, to prove that the defendant brought into this state funds and assets belonging to the estate of the testator. The only witness produced by plaintiffs upon this controverted issue was the defendant herself. Her testimony does not establish it. Indeed, it appears therefrom that she brought no property belonging to the estate from New York to Colorado, unless it is a gold watch, which, some time before the hearing, had been returned to the former state, and concerning whose ownership at the time there was a dispute. If the defendant has possession or control of any property belonging to the estate, it is, for aught that appears from this record, in bank, or in the form of investments or real estate, all in the state of New York. In her brief appellant challenged appellees to point out in the record any evidence whatever that any of the assets of the estate was brought into this state by the executrix. In their brief appellees have not referred to any portion of the record where this proof is disclosed. Considering the voluminous record, we would have been justified in assuming for the purposes of the opinion that none such exists. We have, however, examined the abstract, and are unable to find sufficient evidence of this essential fact upon which the jurisdiction of the court depended. Proof not being made of this essential fact, necessary in this kind of a case to give the courts of this state jurisdiction, it follows that the trial court, upon the showing made, should have dismissed the action. * * *[5]

MOORE v. PETTY.

(Circuit Court of Appeals of United States, 1905. 135 Fed. 668, 68 C. C. A. 306.)

In Error to the Circuit Court of the United States for the Northern District of Iowa.

HOOK, Circuit Judge. The assignments of error present but four propositions which require consideration: Had plaintiffs, as foreign executors, authority to maintain the action in the state of Iowa?[6]

[5] See, also, Keiningham v. Keiningham's Ex'r (Ky.) 71 S. W. 497 (1903); Courtney v. Pradt (C. C. A.) 160 Fed. 561 (1908).

[6] The statement of facts has been omitted. Only so much of the opinion is given as relates to this point.

Did the Circuit Court commit error in permitting the plaintiffs to amend their petition on the eve of trial? Was the fact that no writing in the form of a verdict was signed by or on behalf of the jury fatal to the judgment? Did the Circuit Court err in directing a verdict for the plaintiffs upon the evidence adduced at the trial?

1. The will of the testatrix was duly probated in Allegheny county, Pa., and, the plaintiffs having qualified as executors, letters testamentary were there issued to them in due course. An attested copy of the will and a transcript of the probate proceedings were recorded in the county in Iowa in which the land was situated. By an order of the probate court in Iowa the same executors were appointed as such in that state, but they did not there qualify or give bond or receive letters testamentary. We will not pause to consider whether the language of the order in Iowa invested the executors with a domestic character, and whether the failure to qualify, give bond, and take out letters testamentary in that state can be urged in this proceeding. It may be assumed for the purposes of this cause that they were purely foreign executors; possessing, however, under an express provision of a statute of Iowa, the power to sell and convey the real property of the testatrix in that state. Proceeding with this assumption, did they have the right to maintain the action in Iowa for the recovery from their agents of the proceeds of a sale of land made under their authority? This question was presented by the defendants' answer, wherein it was alleged that the plaintiffs were appointed and qualified as executors only in the state of Pennsylvania, and that they had never been qualified or authorized to act as such under the laws of the state of Iowa. The general rule undoubtedly is that an executor or administrator in his representative capacity cannot maintain an action in the courts of any sovereignty other than that under whose laws he was appointed and qualified, without obtaining an ancillary grant of letters in the state where the action is brought unless the right so to do is conferred upon him by the law of the forum. Fenwick v. Sears' Administrators, 1 Cranch, 259, 2 L. Ed. 101; Dixon's Executors v. Ramsay's Executors, 2 Cranch, 319, 2 L. Ed. 453; Doe v. McFarland, 9 Cranch, 151, 3 L. Ed. 687; Kerr v. Moon, 9 Wheat. 565, 6 L. Ed. 161; Vaughan v. Northup, 15 Pet. 1, 5, 10 L. Ed. 639; Noonan v. Bradley, 9 Wall. 394, 19 L. Ed. 757; Johnson v. Powers, 139 U. S. 156, 11 Sup. Ct. 525, 35 L. Ed. 112. The rule as to foreign guardians is the same. Morgan v. Potter, 157 U. S. 195, 15 Sup. Ct. 590, 39 L. Ed. 670. But whenever the cause of action declared upon by the foreign executor or administrator is one which involves an assertion of his own right, rather than one of the deceased, or which has accrued directly to him through his contract or transaction, and was not originally an asset of the estate in his charge he may maintain an action in another state for the enforcement thereof, although express authority so to do may not be found in a statute of the forum. The principle underlying this modification

of the general rule is that, when the cause of action accrues directly to the executor or administrator, it is assets in his hands for which he may sue in his personal capacity, and, if he sues as executor or administrator, the words so describing him will be regarded as merely descriptive, and be rejected as surplusage. See Talmage, Adm'r, v. Chapel, 16 Mass. 71, in which it was held that, where a judgment had been recovered in New York by an administrator appointed in that state, he could bring suit upon the judgment in Massachusetts without taking out letters of administration there. This case was approved in Biddle v. Wilkins, 1 Pet. 686, 692, 7 L. Ed. 315. See, also, Mowry v. Adams, 14 Mass. 327; Williams v. Moore, 9 Pick. (Mass.) 432; Kane v. Paul, 14 Pet. 33, 42, 10 L. Ed. 311. The general rule is recognized and applied in Iowa (McClure v. Bates, 12 Iowa, 77), and also the qualification which has been stated (Greasons v. Davis, 9 Iowa, 219; Chamberlain v. Wilson, 45 Iowa, 149). In Greasons v. Davis the plaintiffs, foreign executors, brought an action in Iowa upon transcripts of judgments rendered in Pennsylvania. One of the defenses was that the plaintiffs were not qualified to sue when the action was commenced. It appeared that the plaintiffs' testator recovered the judgments in Pennsylvania, and, having died, the plaintiffs, as executors, were substituted on the record, which, under the practice in that state, put them in the position of judgment creditors, as though they had been the original plaintiffs in the actions. The trial court in Iowa was requested to instruct the jury that, if the plaintiffs were not appointed and qualified as executors under the laws of Iowa at the commencement of the action, they could not recover. A refusal of the instruction was sustained by the Supreme Court of Iowa, which said: "If they had not been made parties in Pennsylvania, they could not sue without taking out letters here. * * * Other reasons may require that they should still take out letters, in order to administer his estate here, but these reasons do not require it before suing in the present case."

The doctrine is more clearly illustrated in Chamberlain v. Wilson. Chamberlain, a citizen of Nebraska, died, holding a note executed by a resident of Iowa, and secured by mortgage upon real property in the latter state. Letters of administration were issued in Nebraska to Van Horn, who, in his representative capacity, took possession of the note. He sent the note for collection to one Wilson, in Iowa, who collected a portion thereof from the maker, and had the money in his hands, ready to pay to the party entitled. A son of the deceased took out letters of administration in Iowa, demanded the money from Wilson, and sued him in that state upon his refusal to pay. The Nebraska administrator filed his petition as intervener, and claimed the money. It was held that, as the foreign administrator took actual possession of the note in question, embraced it in his inventory, and was charged with the principal and primary administration of the estate, he was entitled to the further control of it and its proceeds, which

he did not lose by sending it to Iowa for collection. The court said: "He may, in our opinion, maintain an action against Wilson for the proceeds of the note collected and in his possession, in his own name, without taking out new letters of administration. Probably, under the doctrine of McClure v. Bates, 12 Iowa, 77, he might not be enabled to maintain an action as administrator for the collection of the note. But the note came rightfully into his possession in virtue of the administration granted in Polk county, Nebraska. It was collected, and the proceeds were in the hands of Wilson, so that the right to maintain an action upon the note is not involved."

This doctrine is elsewhere generally recognized. In Trecothick v. Austin, 4 Mason, 16, Fed. Cas. No. 14,164, Mr. Justice Story said: "But it is by no means clear that, if Trecothick's executors were now suing, they would be obliged in the present case to take out letters of administration here before they could proceed. The demand against Ivers or the defendant [J. L. Austin] is not a demand which accrued in Trecothick's lifetime, or out of any contract with him. But it is a demand which accrued under agencies created by them, in their character as executors, after the death of Trecothick. They might, under such circumstances, have maintained a suit in their own names for an account against their agent, and need not have sued in their representative capacity. See Cockerill v. Kynaston, 4 Term R. 280; Cowell v. Watts, 6 East, 405; Thompson v. Stent, 1 Taunt. 322; Toll, Ex'rs, bk. 3, c. 10, p. 439. The agent would be estopped to deny their right to receive what he had collected in virtue of their authority. See Nickolson v. Knowles, 5 Madd. 47; 10 Vin. Abr. 'Estoppel,' M; 2 Comp. 11."

In Lawrence v. Lawrence, 3 Barb. Ch. (N. Y.) 71, Chancellor Walworth said: "As a general rule, a foreign executor is not entitled to sue in our courts without having proved the will and taken out letters testamentary thereon in the proper probate court of this state. These rules, however, are only applicable to suits brought by executors for debts due to the testator, or where the foundation of the suit was based upon some transaction with the testator in his lifetime. They do not prevent a foreign executor from suing in our courts upon a contract made with himself as such executor."

To the same effect are Fox v. Tay, 89 Cal. 339, 24 Pac. 855, 26 Pac. 897, 23 Am. St. Rep. 474; State v. Kaime, 4 Mo. App. 479; Tyer v. Milling Co., 32 S. C. 598, 10 S. E. 1067; Lewis v. Adams, 70 Cal. 403, 11 Pac. 833, 59 Am. Rep. 423; Barton v. Higgins, 41 Md. 539; Rogers v. Hatch, 8 Nev. 35; Wayland v. Porterfield's Ex'r, 58 Ky. 638; Barrett v. Barrett, 8 Me. 346; Trotter v. White, 18 Miss. (10 Smedes & M.) 607; Johnston v. Wallis, 41 Hun, 420; Terrell v. Crane, 55 Tex. 81; Griswold v. Railroad Co. (C. C.) 9 Fed. 797, 798; Goodyear v. Hullihen, 2 Hughes, 492, Fed. Cas. No. 5,573.

In the case at bar the cause of action did not exist in the lifetime of the deceased. The proceeds of the sale sued for were never assets

of her estate. The employment of defendants as agents to make the sale of the land was by the plaintiffs as executors. The right to recover the avails of any such sale accrued directly to the plaintiffs, and they were authorized to assert it in Iowa without procuring new letters in that state. * * *[7]

WILKINS v. ELLETT.

(Supreme Court of the United States, 1883. 108 U. S. 256, 2 Sup. Ct. 641, 27 L. Ed. 718.)

GRAY, J. This is an action of assumpsit on the common counts, brought in the Circuit Court of the United States for the Western District of Tennessee. The plaintiff is a citizen of Virginia, and sues as administrator, appointed in Tennessee, of the estate of Thomas N. Quarles. The defendant is a citizen of Tennessee, and surviving partner of the firm of F. H. Clark & Co. The answer sets up that Quarles was a citizen of Alabama at the time of his death; that the sum sued for has been paid to William Goodloe, appointed his administrator in that state, and has been inventoried and accounted for by him upon a final settlement of his administration; and that there are no creditors of Quarles in Tennessee. The undisputed facts, appearing by the bill of exceptions, are as follows:

Quarles was born at Richmond, Virginia, in 1835. In 1839 his mother, a widow, removed with him, her only child, to Courtland, Alabama. They lived there together until 1856, and she made her home there until her death, in 1864. In 1856 he went to Memphis, Tennessee, and there entered the employment of F. H. Clarke & Co., and continued in their employ as a clerk, making no investments himself, but leaving his surplus earnings on interest in their hands until

[7] A foreign executor or administrator may sue in his own name for the recovery of property which has vested in him under the law of the state where he was appointed. Patchen v. Wilson, 4 Hill (N. Y.) 57 (1842). Or upon a negotiable instrument payable to bearer. Sanford v. McCreedy, 28 Wis. 103 (1871); Barrett v. Barrett, 8 Me. 353 (1832). Or upon a judgment recovered by him upon a cause of action existing in favor of the deceased. Talmage v. Chapel, 16 Mass. 71 (1819); Biddle v. Wilkins, 1 Pet. 686, 7 L. Ed. 315 (1828). But not upon a judgment obtained by the deceased himself. Miller v. Hoover, 121 Mo. App. 568, 97 S. W. 210 (1906). He may likewise execute as persona designata a power of sale contained in a mortgage. Doolittle v. Lewis, 7 John. Ch. (N. Y.) 45, 11 Am. Dec. 389 (1823); Hayes v. Frey, 54 Wis. 503, 11 N. W. 695 (1882); Thurber v. Carpenter, 18 R. I. 782, 31 Atl. 5 (1895). Or sell real estate in a foreign jurisdiction as donee of a power in trust contained in a will. Green v. Alden, 92 Me. 177, 42 Atl. 358 (1898). Or sue as donee of the universality of the personal and real estate of a testator disposing of his property under the civil law. Vanquelin v. Bouard, 15 C. B. (N. S.) 341 (1863).

In many jurisdictions a foreign executor or administrator may now sue in his representative capacity under such terms and conditions as the statutes of the state may prescribe. See Woerner, American Law of Administration, § 163.

January, 1866, when he went to the house of a cousin in Courtland, Alabama, and while there died by an accident, leaving personal estate in Alabama. On the 27th of January, 1866, Goodloe took out letters of administration in Alabama, and in February, 1866, went to Memphis, and there, upon exhibiting his letters of administration, received from defendant the sum of money due to Quarles, amounting to $3,455.22 (which is the same for which this suit is brought), and included it in his inventory and in his final account, which was allowed by the probate court in Alabama. There were no debts due from Quarles in Tennessee. All his next of kin resided in Virginia or in Alabama; and no administration was taken out on his estate in Tennessee until June, 1866, when letters of administration were there issued to the plaintiff.

There was conflicting evidence upon the question whether the domicile of Quarles at the time of his death was in Alabama or in Tennessee. The jury found that it was in Tennessee, under instructions, the correctness of which we are not prepared to affirm, but need not consider, because, assuming them to be correct, we are of opinion that the court erred in instructing the jury that if the domicile was in Tennessee they must find for the plaintiff; and in refusing to instruct them, as requested by the defendant, that the payment to the Alabama administrator before the appointment of one in Tennessee, and there being no Tennessee creditors, was a valid discharge of the defendant, without reference to the domicile.

There is no doubt that the succession to the personal estate of a deceased person is governed by the law of his domicile at the time of his death; that the proper place for the principal administration of his estate is that domicile; that administration may also be taken out in any place in which he leaves personal property; and that no suit for the recovery of a debt, due to him at the time of his death, can be brought by an administrator as such in any state in which he has not taken out administration. But the reason for this last rule is the protection of the rights of citizens of the state in which the suit is brought; and the objection does not rest upon any defect of the administrator's title in the property, but upon his personal incapacity to sue as administrator beyond the jurisdiction which appointed him.

If a debtor, residing in another state, comes into the state in which the administrator has been appointed, and there pays him, the payment is a valid discharge everywhere. If the debtor, being in that state, is there sued by the administrator, and judgment recovered against him, the administrator may bring suit in his own name upon that judgment in the state where the debtor resides. Talmage v. Chapel, 16 Mass. 71; Biddle v. Wilkins, 1 Pet. 686, 7 L. Ed. 315.

The administrator, by virtue of his appointment and authority as such, obtains the title in promissory notes or other written evidences of debt, held by the intestate at the time of his death, and coming to the possession of the administrator; and may sell, transfer, and in-

dorse the same; and the purchasers or indorsees may maintain actions in their own names against the debtors in another state, if the debts are negotiable promissory notes, or if the law of the state in which the action is brought permits the assignee of a chose in action to sue in his own name. Harper v. Butler, 2 Pet. 239, 7 L. Ed. 410; Shaw, C. J., in Rand v. Hubbard, 4 Metc. (Mass.) 252, 258–260; Petersen v. Chemical Bank, 32 N. Y. 21, 88 Am. Dec. 298. And on a note made to the intestate, payable to bearer, an administrator appointed in one state may sue in his own name in another state. Barrett v. Barrett, 8 Greenl. (Me.) 353; Robinson v. Crandall, 9 Wend. (N. Y.) 425.

In accordance with these views, it was held by this court, when this case was before it after a former trial, at which the domicile of the intestate appeared to have been in Alabama, that the payment in Tennessee to the Alabama administrator was good as against the administrator afterwards appointed in Tennessee. Wilkins v. Ellett, 9 Wall. 740, 19 L. Ed. 586.

The fact that the domicile of the intestate has now been found by the jury to be in Tennessee does not appear to us to make any difference. There are neither creditors nor next of kin in Tennessee. The Alabama administrator has inventoried and accounted for the amount of this debt in Alabama. The distribution among the next of kin, whether made in Alabama or in Tennessee, must be according to the law of the domicile; and it has not been suggested that there is any difference between the laws of the two states in that regard.

The judgment must, therefore, be reversed, and the case remanded with directions to set aside the verdict and to order a new trial.[8]

[8]Accord: In re William's Estate, 130 Iowa, 553, 107 N. W. 608 (1906). But a payment to a foreign administrator after the appointment of an ancillary administrator within a local jurisdiction will not constitute a discharge. Stone v. Scripture, 4 Lans. (N. Y.) 186 (1870); Walker v. Welker, 55 Ill. App. 118 (1893). Unless, perhaps, the payment is made in ignorance of the local appointment and there appear to be no local creditors. Maas v. German Sav. Bank, 176 N. Y. 377, 68 N. E. 658, 98 Am. St. Rep. 689 (1903). The domiciliary administrator is bound as far as possible to collect foreign assets. In re Ortiz's Estate, 86 Cal. 306, 24 Pac. 1034, 21 Am. St. Rep. 44 (1890). See, also, Klein v. French, 57 Miss. 662 (1880), and 45 Am. St. Rep. 664–674. Where letters of administration are granted to him in different jurisdictions, he is accountable in each jurisdiction for the property which he has there received and for that only. Normand's Adm'r v. Grognard, 17 N. J. Eq. 425 (1865). But see Cureton v. Mills, 13 S. C. 409, 36 Am. Rep. 700 (1879).

PETERSEN v. CHEMICAL BANK.

(Court of Appeals of New York, 1865. 32 N. Y. 21, 88 Am. Dec. 298.)

Action to recover $32,321.24, the amount standing to the credit of Aaron Cohen on the books of the defendant bank, in New York. Cohen died at his residence in Connecticut on July 27, 1862, and David J. Peck was appointed administrator with the will annexed by the probate court of the district of New Haven, Conn. Peck presented an authenticated copy of his appointment to the defendant and demanded payment of the above amount, but payment was declined. He thereupon assigned the debt owing by the defendant bank to the plaintiff in this action. Plaintiff called at the bank, exhibiting the instrument under the hand and seal of the administrator, Peck, and demanded the money. He exhibited at the same time an instrument signed by all the legatees named in the will, with the exception of one who resided in an insurgent state and who was entitled to one-sixth of the residue, requesting that the money might be paid over to Peck as administrator. Defendant persisted in refusing payment, on the ground, apparently, that the moneys could not safely be paid except to an administrator appointed under the laws of the state of New York.[9]

DENIO, C. J.[10] [After holding that Cohen's domicile at the time of his death was at New Haven the learned justice continued:]

A foreign executor or administrator (and one appointed under the laws of a sister state of the Union is foreign in the sense of the rule) cannot sue in his representative character in the courts of this state. The question whether a party deriving title to a chose in action by transfer from such an executor or administrator, can prosecute the debtor residing here, in our courts, has been variously decided in the cases to which we have been referred. In the Supreme Court in the First District, the Merchants' Bank of New York was sued for refusing to transfer to the plaintiff one hundred shares of its stock, to which the latter made title by transfers from the executors of one Robert Middlebrook, in whose name the stock stood on the books of the bank. He died at his residence in Connecticut, and his will had been proved, and letters testamentary had been issued by the probate court of the proper district in that state. The plaintiff was a legatee of a certain amount of the testator's stock, and the shares in controversy had been assigned to him in satisfaction of the legacy. The court held that the executors became vested with the title to the stock, and that the plaintiff, though he derived his title under them, could enforce his right against the bank in our courts, and judgment was accordingly given in his favor. Middlebrook v. Merchants' Bank, 27 How. Pr. 474; s. c., at Special Term, 24 How. Pr. 267.

[9] This statement of facts has been substituted for that of the original report.

[10] The concurring opinion of Potter, J., has been omitted.

A different rule has been established in the courts of New Hampshire and of Maine. Thompson v. Wilson, 2 N. H. 291; Stearns v. Burnham, 5 Greenl. (Me.) 261, 17 Am. Dec. 228. In each of these cases the defendant was sued as the maker of a promissory note, by parties claiming as indorsees under indorsements by the executors of the payees who were respectively residents of Massachusetts, and whose wills were proved and letters thereon issued in that state. The defendants prevailed in each case, on the objection that the respective plaintiffs were subject to the same disability to sue which would have attached to the executors if they had attempted to prosecute in another state than that under whose laws their letters testamentary were granted. In the first case the judgment was placed upon the English ecclesiastical law, by which probates of wills and grants of administration are void when not made by the ordinary of the proper diocese, a doctrine which I do not think applicable to questions arising between different states, as it makes no allowance for the principles of international comity. In the case in Maine, it was thought that allowing a recovery would be an indirect mode of giving operation in Maine to the laws of Massachusetts, and also that the effects of the deceased might thereby be withdrawn from the state, to the prejudice of creditors residing there.

The precise case now before us came before the Supreme Court of the United States in Harper v. Butler, 2 Pet. 239, 7 L. Ed. 410. The suit was brought in Mississippi, on a chose in action, originally existing in favor of a citizen of Kentucky, who died there, and whose executor having letters testamentary issued in that state, assigned it to the plaintiff. In Mississippi, choses in action are assignable so as to permit the assignee to sue in his own name, as is now the case in this state. The question arose on demurrer to the complaint, and the District Court sustained the demurrer. The judgment was reversed upon a short opinion by Chief Justice Marshall, which merely states the point, and contains no general reasoning. No counsel appeared on behalf of the defendant.

The case in Maine has been made the subject of comment in Story's Treatise on the Conflict of Laws, §§ 258, 259, and is decidedly disapproved by the learned writer. He says, that upon the reasoning of the case a promissory note would cease to be negotiable after the death of the payee, which, he observes, would certainly not be an admissible proposition.

It seems clear to me that there are no precedents touching the question which are binding upon this court, or which can relieve it from the duty of examining the question upon principle. There are certain legal doctrines, now very well established, which have a strong bearing upon the point. It is very clear, in the first place, that neither an executor or administrator, appointed in a foreign political jurisdiction, can maintain a suit in his own name in our courts. Foreign laws have no inherent operation in this state; but it is not on this account solely

or principally that we deny foreign representatives of this class a standing in our courts. The comity of nations, which is a part of the common law, allows a certain effect to titles derived under and powers created by the laws of other countries. Foreign corporations may become parties to contracts in this state, and may sue or be sued in our courts on contracts made here or within the jurisdiction which created them. The only limitation of that right is the inhibition to do anything in its exercise which shall be hostile to our own laws or policy. Bank of Augusta v. Earle, 13 Pet. 519, 10 L. Ed. 274; Bard v. Poole, 2 Kern. 495, 505, and cases cited. And yet nothing can be more clearly the emanation of sovereign political power than the creation of a corporation. Again, the receivers of insolvent foreign corporations, and assignees of bankrupt and insolvent debtors, under the laws of other states and countries, are allowed to sue in our courts. It is true their titles are not permitted to overreach the claims of domestic creditors of the same debtor, pursuing their remedies under our laws; but in the absence of such contestants they fully represent the rights of the foreign debtors. Story's Confl. Laws, § 112; Hoyt v. Thompson, 5 N. Y. 320; s. c., 19 N. Y. 207; Willitts v. Waite, 25 N. Y. 584. It is not therefore because the executor or administrator has no right to the assets of the deceased, existing in another country, that he is refused a standing in the courts of such country, for his title to such assets, though conferred by the law of the domicile of the deceased, is recognized everywhere. Reasons of form, and a solicitude to protect the rights of creditors and others, resident in the jurisdiction in which the assets are found, have led to the disability of foreign executors and administrators, which disability, however inconsistent with principle, is very firmly established. We have lately decided that if the debtors of the deceased will voluntarily pay what they owe to the foreign executor, such payment will discharge the debts, and the moneys so collected will be subject to the administration of such foreign executor. Parsons v. Lyman, 20 N. Y. 103.

But the principle of law which I think governs this case is, that the succession to the personal estate of a deceased person is governed by the law of the country of his domicile at the time of his death. This is so whether the succession is claimed under the law providing for intestacy or for transmission by last will and testament. See Parsons v. Lyman, supra, and authorities cited at page 112. It is not so held because the foreign Legislature or the local institutions have any extraterritorial force, but from the comity of nations. Accordingly, it is a necessary supplement to the doctrine that, if the lawmaking power of the state where the property happens to be situated, or the debtor of the deceased reside, to subserve its own policy, has engrafted qualifications or restrictions upon the rights of those who would succeed to the estate by the law of the domicile, they must take their rights subject to such restrictions. One of the most natural, as well as the most usual of these qualifications is that which is intended to secure

the creditors of the deceased residing in the county where the assets exist. It is in part to subserve this policy that the personal representatives are not permitted to prosecute the debtor or parties who withhold his effects in our courts. But the protection to the creditor is further secured by the remedy which is provided by allowing them to take out administration in the jurisdiction where the assets are. If the deceased have any relatives in this state who would be preferably entitled, they can be summoned, and if they elect to take out letters themselves, they will be compellable to give bond, and the creditors will be then made secure in their rights, or if the relatives refuse to assume that responsibility, then the creditors may themselves be appointed, and thus qualified to take possession of the assets here upon the same terms. 2 Rev. St. (1st. Ed.) p. 73, pt. 2, c. 6, tit. 2, §§ 23, 24. If the debtors of the estate elect to pay to the former representative, or to deliver to him the movable assets, before the granting of administration in this state, the domestic creditors are put to the inconvenience of asserting their rights in the courts of the country of their debtor's domicile against his representatives appointed under the laws of that country, just as they would have been compelled to do if all his effects had been situated there. Another general principle of law necessary to be adverted to is, that the executor of a testator, as soon at least as he has clothed himself with the commission of the probate court, is vested with the title to all the movable property and rights of action which the deceased possessed at the instant of his death. The title of the executor, it is true, is fiduciary and not beneficial. That title is, however, perfect against every person except the creditors and legatees of the deceased. The devolution of ownership is direct to the representative, and the beneficiaries take no title in the specific property which the law can recognize. An administrator with the will annexed, has the same rights of property as the executor named in the will would have had if he had qualified. 2 Rev. St. (1st Ed.) p. 72, pt. 2, c. 6, tit. 2, § 22.

The law of maintenance, while it existed, prohibited the transfer of the legal property in a chose in action, so as to give the assignee a right of action in his own name. But this is now abrogated, and such a demand as that which is asserted against the defendant in this suit may be sold and conveyed so as to vest in the purchaser all the legal as well as the equitable rights of the original creditor. Voorhies' Code (6th Ed.) § 111. Though such demands are not negotiable in precisely the same sense as commercial paper, since the assignee is subject to every substantial defense which might have been made against the assignor, yet where, as in this case, no such defense exists, the transfer is absolute and complete. The title which is vested in the executor carries with it the jus disponendi which generally inheres in the ownership of property. "It is a general rule of law and equity," says Judge Williams, in his Treatise on Executors, "that an executor or administrator has an absolute power of disposal over the whole

personal effects of his testator or intestate, and that they cannot be followed by creditors, much less by legatees, either general or specific, into the hands of the alienee." Treatise, p. 796. See, also, Whale v. Booth, 4 Term R. 625, in note to Farr v. Newman, 4 Term R. 632; Sutherland v. Brush, 7 Johns. Ch. 17, 11 Am. Dec. 383; Rowlinson v. Stone, 3 Wils. 1; Harper v. Butler, supra.

It follows that the plaintiff presented himself to the superior court as the owner by purchase and assignment of the debt against the defendant, from a person holding the title and hence having authority to sell. He claimed to recover, not as the representative of any other party, but as the substituted creditor of the defendants' bank. He had, it is true, to make title through the will of Cohen, and the proceedings of the probate court of Connecticut. But the validity of that title depended upon the law of Connecticut, that being the place of the domicile of the former owner of the demand. The validity of every transfer, alienation or disposition of personal property depends upon the law of the owner's domicile. Story on Confl. of Laws, § 383. In the absence of proof to the contrary, we assume the law of Connecticut respecting the alienation of choses in action to be the same as our own. If Cohen had, at his death, been a resident of this state, and his administrator with the will annexed had sold and assigned to the plaintiff his demand against the bank, there is no manner of doubt but that the assignee, upon the refusal of the bank to pay the amount, could have maintained this action.

Hence there is not, I think, any reason why the plaintiff should be precluded from maintaining his action, on account of his making title through a foreign administration. The rule is not that our courts do not recognize titles thus acquired. It is simply that a foreign executor or administrator can have no standing in our courts. The plaintiff does not occupy that position. He sues in his own right and for his own interest, and represents no one. In my opinion, the disability to sue does not attach to the subject of the action, but is confined to the person of the plaintiff. If he is an unexceptionable suitor, and there is no rule of form or of policy which repels him from our courts, he is to be received, and he may make out his title to the subject claimed, in any manner allowed by law; and it has been shown that title acquired through a foreign administration is universally respected by the comity of nations.

It is pretty obvious from the evidence of the circumstances of the transfer by Peck to the plaintiff, that its object was to avoid the objection which might be taken if Peck had sued in his own name as administrator, without taking out letters here. There was no other conceivable motive for the plaintiff to purchase this moneyed demand payable immediately, for its precise amount paid down. If his check on the bank, drawn shortly after the transfer, had been answered, he would have received the precise amount he had parted with, and the transaction at the best would have been paying with one hand and re-

ceiving the same amount back with the other. If he failed to realize the amount, he was to be indemnified by Peck. This circumstance, and the manner in which the assumed consideration was disposed of, would doubtless have led the jury to find, that the form adopted was resorted to in order to enable the administrator to avail himself of the balance in the defendant's bank, without taking out administration here. Still, as between the plaintiff and Peck, the interest in the demand passed. Peck would have been estopped by his conveyance under seal, containing an acknowledgment of the payment of the consideration, from setting up that nothing passed by the conveyance. I am of opinion that the defendant cannot make a question as to the consideration. If all the parties had been residents of this state, a transfer of the demand, good as between the parties to that transfer, would have obliged the defendant to respond to the action of the transferee. Then if we hold, as I think we should, that the objection to the suit of the administrator was in the nature of a personal disability to sue, and not an infirmity inhering in the subject of the suit, the fact that the transfer was made for the purpose of getting rid of the objection, should not prejudice the plaintiff. The cases which have been referred to upon this point have considerable analogy. The Constitution and laws of the United States confer upon the courts of the Union jurisdiction in suits between citizens of different states, with an exception, contained in an act of Congress, of one suing as the assignee of a chose in action, of a party whose residence was such as not to permit him to sue. In an action by an assignee concerning the title to land, which was not within the exception, it was held not to be an objection which the defendant could take, that the assignment was made for the purpose of removing the difficulty as to jurisdiction. Briggs v. French, 2 Sumn. 251, Fed. Cas. No. 1,871. In a late case in this court against a foreign corporation, which could not be prosecuted here except by a resident of this state, unless the cause of action arose here or the subject of the action was situated here, it was held that the objection—that the assignment of the demand by one not qualified by his residence to sue, to the plaintiff who was thus qualified, was made for the purpose of avoiding the difficulty—could not be sustained. McBride v. Farmers' Bank, 26 N. Y. 450.

I have not thus far referred to the circumstance that Cohen was shown not to have owed any debts in this state. That fact was proved as strongly as in the nature of the case such a position could be established. The administrator, whose business it was to ascertain the existence of debts, and the confidential servant of Cohen who was very familiar with his transactions, affirmed that there were none; and the defendant gave no evidence on the subject. The motive of policy for forbidding the withdrawal of assets to the prejudice of domestic creditors, did not therefore exist in this case. Still, if the rule is that neither the foreign administrator or his assignee can maintain an action in our courts to collect a debt against a debtor residing here, on account

of its tendency to prejudice domestic creditors, the exceptional features of the present case would not change the principle. It would often be more difficult than in this case to disprove the existence of such debts. But I am of opinion that the objection should be regarded as formal, and that it does not exist where the plaintiff is not a foreign executor or administrator but sues in his own right, though his title may be derived from such a representative.

I am in favor of affirming the judgment of the Supreme Court.[11]

Omit - 711

BROWN v. SMITH.

(Supreme Judicial Court of Maine, 1906. 101 Me. 545, 64 Atl. 915, 115 Am. St. Rep. 339.)

The plaintiff held by assignment a mortgage of the demanded premises, given May 28, 1887, by Albert D. Bumps, of Thorndike, Me., to George Tyler, of Boston, Mass., to secure a certain judgment recovered by said Tyler against said Bumps in the Supreme Judicial Court, Waldo county. Afterwards the said Tyler died, and Isabella J. Tyler, of Waltham, Mass., was duly appointed administratrix of the estate of said Tyler by the probate court of Middlesex county, Mass. The administratrix then assigned said mortgage to the plaintiff.

There was no ancillary administration on the estate of the said deceased, George Tyler, in the state of Maine. The defendant contended, among other things, that the administratrix of the estate of said deceased, George Tyler, had no power to make a valid assignment of the aforesaid mortgage given to her intestate, as she had been appointed administratrix in another state while the mortgage was of land in the state of Maine.

POWERS, J. Writ of entry to recover certain lands in Thorndike. The case comes here on report.

To make out title plaintiff introduced: (1) A duly recorded mortgage of the demanded premises from Albert D. Bumps, of Thorndike, Me., to George Tyler, of Boston, Mass., dated May 28, 1887, given to secure a certain execution and judgment recovered by said Tyler against said Bumps in this court in said Waldo county; (2) copies of records of the probate court of Middlesex county, Mass., showing that December 10, 1889, Isabella J. Tyler, of Waltham, in

[11]Accord: Luce v. Manchester & L. R. R., 63 N. H. 588, 3 Atl. 618 (1885). Contra: Stearns v. Burnham, 5 Greenl. (Me.) 261, 17 Am. Dec. 228 (1828); McCarty v. Hall, 13 Mo. 480 (1850). Such an assignment will not be recognized after the appointment of an ancillary administrator. Du Val v. Marshall, 30 Ark. 230 (1875); Murphy v. Crouse, 135 Cal. 14, 66 Pac. 971, 87 Am. St. Rep. 90 (1901). It has been held that it will be recognized only as against a debtor of the state in which the deceased had his domicile. Elmer v. Hall, 148 Pa. 345, 23 Alt 971 (1892).

the county of Middlesex, was duly appointed administratrix of the estate of George Tyler, late of said Waltham, deceased; (3) assignment from said administratrix to the plaintiff of said mortgage, duly recorded, and dated November 21, 1904. This makes a prima facie case, if an administratrix appointed in another state has power to assign a mortgage given to her intestate upon real estate in this state.

It is a well-settled principle of the common law that the power and authority of an administrator or executor over the estate of the deceased is confined to the sovereignty by virtue of whose laws he is appointed. In recognition of this principle provision is made by our statutes for the granting of ancillary administration on the estate of nonresidents who died leaving estate to be administered in this state, or whose estate is afterwards found therein. Rev. St. 1903, c. 65, § 7; chapter 66, §§ 14, 15, and 16.

One reason at least upon which this rule is founded, is to prevent the effects or credits of the deceased found in any state, which may be needed to satisfy debts due to the citizens of that state, from being withdrawn from its jurisdiction. That no such necessity in fact exists can never be known with certainty in any given case, unless administration is granted, and an opportunity thereby afforded to creditors to present their claims. Mansfield v. McFarland, 202 Pa. 173, 51 Atl. 763. It is said in Stearns v. Burnham, 5 Me. 261, 17 Am. Dec. 228, that the principles of justice and policy, upon which similar statutes to those above cited were founded, "would seem to lead our courts of law to that course of proceedings which would harmonize with those principles and have a manifest tendency to produce the same beneficial results." In that case it was accordingly held that an executor appointed under the laws of another state cannot indorse a promissory note payable to his testator by a citizen of this state so as to give the indorsee a right of action here in his own name.

The debt due from Bumps, who, at the time of the recovery of the judgment and ever since, has been a resident of this state, constituted no part of the goods, effects, rights, and credits of the intestate in Massachusetts, which alone the administratrix was authorized and empowered to administer. The debt follows the creditor while living. After his death it follows the debtor. Saunders v. Weston, 74 Me. 85. The situs of the debt being in Maine, the administratrix, deriving her authority solely from the laws of Massachusetts, had no control over it.

There is even stronger reason for holding that she had no control over the mortgage. A mortgage and its assignment are conveyances of land in fee, which must be recorded. It is desirable that title to real estate should, so far as possible, appear of record. The party having a right to redeem ought to be able, by an examination of the records in the registry of deeds and the probate courts of this

state, to ascertain who is entitled to receive payment and give a discharge of the mortgage, without being compelled, at his peril, to incur the expense of searching the records of other states and countries. Without doing this the defendant in the present case could not know, until the evidence was produced at the trial, that the plaintiff's assignor had ever been appointed administratrix of the deceased in the place of his domicile. The courts of Massachusetts, in a case which has been frequently cited and followed in that state, have decided the precise point here presented against the plaintiff's contention. Cutter v. Davenport, 1 Pick. 81, 11 Am. Dec. 149. The question is a new one in this state; but the trend of our decisions has been to restrict the power of a foreign administrator to the jurisdiction of his appointment. Stevens v. Gaylord, 11 Mass. 256; Stearns v. Burnham, supra; Smith v. Guild, 34 Me. 443; Gilman v. Gilman, 54 Me. 453; Smith v. Howard, 86 Me. 203, 29 Atl. 1008, 41 Am. St. Rep. 537; Green v. Alden, 92 Me. 177, 42 Atl. 358.

It may fairly be regarded as the settled policy of this state that, when assets of a foreign decedent are found here, ancillary administration must be obtained here for the protection of resident creditors, before our courts will enforce the recovery of debts due the foreign decedent. Otherwise, the assets could be converted into money, taken outside the state, distributed under the jurisdiction of foreign courts, and our citizens compelled to go into other jurisdictions to collect their just dues. Such is the general rule. Note to Shinn's Estate, 45 Am. St. Rep. 667; Maas v. Bank, 176 N. Y. 377, 68 N. E. 658, 98 Am. St. Rep. 689.

Inasmuch, therefore, as ample provision is made by our statutes for the granting of ancillary administration in this state, a course which seems to be in accord with our legislative policy and judicial decisions, and may in any case be necessary for the protection of our citizens who are creditors of the estate, and in view, also, of the fact that it is desirable, so far as possible, that title to real estate should somewhere appear on record in this state, we hold, in accordance with Cutter v. Davenport, above cited, that an administrator cannot, by virtue of letters granted in another state, assign a mortgage of land situated in this state, so as to enable the assignee to enforce payment thereof. Dial v. Gary, 14 S. C. 573, 37 Am. Rep. 737; 18 Cyc. 1231; Reynolds v. McMullen, 55 Mich. 568, 22 N. W. 41, 54 Am. Rep. 386. The right of a foreign administrator to receive a voluntary payment, and give a discharge of a debt so paid, is not involved in this case.

Judgment for the defendant.[12]

[12]Accord: Dial v. Gary, 14 S. C. 573, 37 Am. Rep. 737 (1880); Heyward v. Williams, 57 S. C. 235, 35 S. E. 503 (1900). See, also, Reynolds v. McMullen, 55 Mich. 568, 22 N. W. 41, 54 Am. Rep. 386 (1885). **Contra: Gove v. Gove**, 64 N. H. 503, 15 Atl. 121 (1888).

ANONYMOUS.[13]

(In Chancery, 1724. 9 Mod. 66.)

The testator, who lived in Holland, and who was seised of a real estate there, and of a considerable personal estate in England, devised all his real estate to the plaintiff, and all his personal estate to the defendant, whom he made executor, and died. But at the time of his death he owed some debts by specialties, and some by simple contract in Holland, and had no assets there to satisfy those debts, other than by his real estate, which, by the custom and laws of Holland, is made liable to the payment of debts upon simple contract as well as upon specialties, if there are not personal assets to answer the same, especially debts upon simple contract for servants wages or for work done.

Now the creditors in Holland sued the plaintiff there, to whom the real estate was devised, and had a sentence against it, by virtue whereof it was sold for the payment of their respective debts.

Thereupon the plaintiff exhibited this bill against the defendant, who was executor, and to whom the personal estate was devised as aforesaid, that he (the plaintiff) might be reimbursed by the defendant for the loss he had sustained in not bringing the personal estate to Holland to discharge the debts there in aid of the real estate.

PER CURIAM. * * * Now by the laws of Holland, all debts shall affect the real estate there; but it is there, as it is here, that the personal estate shall come in aid of the real estate, and be charged in the first place; therefore the personal estate in this case should answer the loss the plaintiff sustained by the sale of the real estate, though that happened in a different dominion.

Therefore it was decreed, that the plaintiff should be reimbursed.[14]

LAWRENCE v. KITTERIDGE.

(Supreme Court of Errors of Connecticut, 1852. 21 Conn. 577, 56 Am. Dec. 385.)

CHURCH, C. J.[15] The first decree of the court of probate appealed from, was predicated upon facts essentially as follows, viz., Cephas Pettibone, the intestate, at the time of his death, was an inhabitant of, and had his domicile in, the state of Vermont, and was possessed of an estate there; and there was due to him here, from a citizen

[13] A part of the facts and opinion, relating to another matter, has been omitted.

[14] See Rice v. Harbeson, 63 N. Y. 493 (1875); Minor, Conflict of Laws, § 112.

[15] The statement of facts and a small portion of the opinion have been omitted.

of this state, a debt of about one thousand dollars. Original administration upon his estate was granted in the state of Vermont, and was in progress, when an ancillary administration was granted in this state. When the decree appealed from was made, there were no unsatisfied debts due from the estate, here or in Vermont, and nothing but a distribution of the estate remained to be done.

The intestate died, leaving brothers and sisters of the whole and half blood; all, excepting the late Augustus Pettibone, Esq., of Norfolk, who was a brother of the whole blood, residing in Vermont, or elsewhere, out of this state; and he had no other heirs at law. By the laws of Vermont, the brothers and sisters of an intestate of the whole and half blood are entitled equally to the estate, under the statute of distribution.

Upon the foregoing state of facts, the court of probate for the district of Norfolk was of opinion, that the personal estate of Cephas Pettibone—the chose in action of one thousand dollars—should be distributed according to the laws of the state of Vermont; and that this could better be done, and without injury to any citizen of this state, by transmitting the money to the administrator there, and to the jurisdiction of the court of principal administration, than to order a distribution of it here. And therefore the decree appealed from was made.

The appellant, who is the representative of Augustus Pettibone, the brother of the whole blood residing in the district of Norfolk, objects to this decree, and appeals from it. He claims, that the assets or money in the hands of the administrator here, should have been distributed here, and according to the laws of this state, which prefer a brother or sister of the whole blood to one of the half blood.

1. We had supposed, that the law of the country of the domicile of an intestate governed and regulated the distribution of his personal estate; and that this was a principle of international law, long ago recognized by jurists in all enlightened governments, and especially recognized by this court, in the recent case of Holcomb v. Phelps, 16 Conn. 127, 133, in which we say, that, "It certainly is now a settled principle of international law, that personal property shall be subject to that law which governs the person of the owner, and that the distribution of and succession to personal property, wherever situated, is to be governed by the laws of that country where the owner or intestate had his domicile at the time of his death." Sto. Conf. Laws, 403, in notis, §§ 480, 465; 2 Kent's Com. Lect. 37; 2 Kaine's Prin. Eq. 312, 826; Potter v. Brown, 5 East, 124; Balfour v. Scott, 6 Bro. Parl. Cas. (Toml. Ed.) 550; Bempde v. Johnstone, 3 Ves. 198; Pepon v. Pepon, Amb. 25, 415; Guier v. O'Daniel, 1 Bin. (Pa.) 349, in notis; Harvey v. Richards, 1 Mason, 381, Fed. Cas. No. 6,184.

It is not necessary that we should now examine the reasons whether of public policy or legal propriety, which have led the tri-

bunals of civilized nations to relax from antiquated notions on this subject; some of these are well considered, by Judge Story, in the case of Harvey v. Richards, 1 Mason, 381, Fed. Cas. No. 6,184, and by Chancellor Kent, in his Commentaries, vol. 2, lect. 37.

It is true, that it is in the power of every sovereignty, and within the constitutional powers of the states of this Union, to repudiate this salutary doctrine, in its application to themselves, or to modify it, for what they may suppose to be the protection of their own citizens; but without some peculiar necessity, it cannot be supposed, that any well regulated government will do it. It was claimed in argument, in this case, that this had been done in this state, and by the provision of the forty-ninth section of our statute for the settlement of estates (Rev. St. 1849, p. 357), by declaring, that when there are no children, etc., of an intestate, his "real and personal estate shall be set off equally to the brothers and sisters of the whole blood." But it was not the purpose of this provision to disregard the universal and salutary doctrine of the law to which we have referred, but only to regulate the descent and distribution of the estates of our own citizens. This provision of our statute is not peculiar to ourselves; a similar one, we presume, may be found in the codes of other states; at least, imperative enactments exist in every state, directing the distribution of estates; but none of them are intended to repeal the law of the domicile, in its effect upon the personal estate of the owner. The controversy, in the case of Holcomb v. Phelps, arose under the same section of our law as does the one now under consideration, and the result of that case must settle this question, if it be one.

There are cases in which the law of the domicile has been modified or restrained, in its full operation, for what courts have supposed to be the proper protection of the rights of the citizens of their own states; but these are generally confined to cases in which creditors are, in some way interested under insolvent proceedings, assignments, or bankrupt laws, and never, we believe, are extended to mere cases of distribution, as here claimed. Sto. Conf. L. 277, § 337.

The views of the court of probate in regard to the operating law of distribution, in this case, were correct; and the remaining question, in this part of the case, is, whether the decree which followed, directing the money in the hands of the administrator here, to be transmitted to the proper jurisdiction in Vermont, for distribution, should be reversed; or whether the court here, should, by its own decree, have made distribution according to the laws of Vermont?

There was but one estate to be settled; and this was, in legal view, attached to the person of the owner, at the time of his death, so far as it was personal. There were two administrations; one original and principal in Vermont; the other ancillary and subordinate, in this state. Perkins v. Stone, 18 Conn. 270; Sto. Conf. L. 423.

The creditors of this estate, and all persons having claims upon it, in this state and in Vermont, were satisfied, and nothing remained to be done, but in the distribution of it among those, who, by the laws of the state of Vermont, were entitled to it. Why were two distributions of this one estate necessary? Without special reasons requiring a different course, there would seem to be a propriety, that the consummating act in the settlement, should have been done, by the tribunal exercising the principal jurisdiction, and that the money accidently and temporarily in this state, should be transmitted thither, for that purpose. Otherwise, there might have been conflicting decrees, and the courts of the different jurisdictions, upon varying proofs, might have found different persons entitled to take as distributees. The law of Vermont was the governing law, and known to the courts of that state, as a matter of certainty; but here, to be ascertained only by proofs, as a matter of fact.

There are cases in which the courts of the ancillary administration have retained the assets, and distributed them according to the law of the domicile; and others, in which they have been transmitted to the principal and original jurisdiction for final action. Harvey v. Richards, 1 Mason, 391, Fed. Cas. No. 6,184; Richards v. Dutch, 8 Mass. 506; Dawes v. Boylston, 9 Mass. 355, 6 Am. Dec. 72.

We do not think it to be a legal consequence, because distribution should be made according to the law of the domicile, that the assets should be transmitted for distribution; the courts of the ancillary jurisdiction may distribute them. Stevens v. Gaylord, 11 Mass. 256; Dawes v. Head et al., 3 Pick. 128; Bruce v. Bruce, 2 Bos. & Pull. 229; Balfour v. Scott, 6 Bro. Parl. Cas. 550; Hog v. Lashley, Id. 577; Drummond v. Drummond, Id. 601; Somerville v. Somerville, 16 Ves. 791.

But it seems now to be settled, that the power of the court granting the ancillary administration is a discretionary one, and should depend for its exercise upon the circumstances and equity of each case. This is a salutary principle, and can work no harm; but in its application, the citizens of the state of the ancillary administration and their rights, are not alone to be regarded, but also the rights of all interested. Harvey v. Richards, 1 Mason, 381, Fed. Cas. No. 6,184; Dawes v. Head, 3 Pick. 128; Topham v. Chapman, 1 Rep. Const. Court, S. C. 292; 2 Kent's Com. Lect. 37; Sto. Conf. L. 424.

We see no good reason to be dissatisfied with the application of this principle and the exercise of this discretion, by the court of probate, in the decree appealed from. The original administration was granted, by a court in a sister state near by, and within one or two days' reach of the appellant, who represents the only person interested in the estate here. All the other interested parties—and there were several of them—resided in the state of Vermont, or elsewhere, where they could, with equal convenience, protect their interests, and receive their portions of the distributed estate, as if the

distribution had been made by the court of probate for the district of Norfolk. A greater inconvenience and expense has been avoided, by the transmission of the money to Vermont for final distribution, than if it had been retained here. And still we do not say, that we would, even under the circumstances of this case, have reversed an order of distribution, if made by the court of probate here. * * *

The superior court is advised, that the orders and decrees of the court of probate should be affirmed.[16]

RAMSEY v. RAMSEY.

(Supreme Court of Illinois, 1902. 196 Ill. 179, 63 N. E. 618.)

Rufus N. Ramsey died a resident of Clinton county, Ill., leaving property in Illinois and Missouri. The assets of the estate amounted to $131,810.42, while the claims presented and allowed against the estate aggregated $183,854.70. Among those claims was one in favor of Julia D. Ramsey and another in favor of G. Van Hoorebeke, the appellants in this case. The claims of appellants were probated and allowed in Missouri and a pro rata payment of 12.44 per cent. upon their respective claims was received by them.

Thereafter the administrator in Illinois was directed by the circuit court of Clinton county to pay all claimants except appellants 12.44 per cent. on their claims and to then distribute the balance in his hands ratably among all claimants of the seventh class. The judgment of the circuit court was affirmed by the Appellate Court, and from that judgment of affirmance Julia D. Ramsey and G. Van Hoorebeke prosecuted this appeal. The Revised Statutes of Missouri of 1889 provided as follows:

"Sec. 263. If a person dies insolvent, his estate found in this state shall, as far as practicable, be so disposed of that all his creditors, here and elsewhere, may receive an equal share in proportion to their respective debts.

"Sec. 264. To this end the estate shall not be transmitted to the foreign administrator until his creditors who are citizens of this state shall have received their just proportion that would be due them if the whole estate, wherever found, were divided among all of said creditors in proportion to their respective debts, without preferring any species of debt to another.

[16] As to transmission of balance to the domiciliary administrator after the payment of local creditors, see, also, Matter of Accounting of Hughes, 95 N. Y. 55 (1884); Young v. Wittenmyre, 123 Ill. 303, 14 N. E. 869 (1888); Welles' Estate, 161 Pa. 218, 28 Atl. 1116, 1117 (1894); In re Gable's Estate, 79 Iowa, 178, 44 N. W. 352, 9 L. R. A. 218 (1890); Smith v. Smith, 174 Ill. 52, 50 N. E. 1083, 43 L. R. A. 403 (1898).

"Sec. 265. No creditor not being a citizen of this state shall be paid out of the assets found here until those who are citizens shall have received their just proportion, as provided in the preceding section."

"Sec. 267. No one shall receive more than would be due him if the whole estate were divided ratably among all creditors who shall have duly proven their claims in the court having jurisdiction thereof in this state." [17]

WILKIN, C. J. It is insisted by appellants that they are entitled to receive full distributive shares of the assets reported by the administrator to the probate court of Clinton county, without in any way being charged with the amounts received from the Missouri assets. The proposition is so manifestly unjust to other creditors of the insolvent estate that it should be sustained only in obedience to strict and imperative requirements of the law. The general policy of the law in all jurisdictions, so far as we are aware, is that all the property of a deceased insolvent debtor not set apart for the widow or minor children shall become assets in the hands of his administrator for the payment pro rata of all his debts according to classification, no matter where the assets may be found or the creditors reside. In Dawes v. Head, 3 Pick. (Mass.) 128, it was said by Parker, J.: "We cannot think that in any civilized country advantage ought to be taken of the accidental circumstances of property being found within its territory which may be reduced to possession by the aid of its courts and law, to sequester the whole for the use of its own subjects or citizens, and where it shall be known that all the estate and effects of the deceased are insufficient to pay his just debts. Such a doctrine would be derogatory to the character of any government." The above quoted sections 263 and 264 of the Missouri statute, as well as other sections of that statute, clearly recognize this just and equitable rule. Our statute provides that, "when the estate is insufficient to pay the whole of the demands, the demands in any one class shall be paid pro rata, whether the same are due by judgment, writing obligatory or otherwise, except as otherwise provided." 1 Starr & C. Ann. St. 1896, c. 3, § 71. Unless, therefore, appellants have shown that their claims are in some way exceptions to the general rule, the judgment of the circuit court is right, and should be affirmed.

It seems to be thought by appellants' counsel that they are entitled to a preference over other creditors, as to the Missouri assets, on the principle that in the settlement of insolvent estates a creditor shall be allowed to prove his whole debt, without regard to any collateral security he may hold, and be entitled to a dividend on the whole claim so allowed—citing Furness v. Bank, 147 Ill. 570, 35 N. E. 624; First Nat. Bank of Peoria v. Commercial Nat. Bank, 151 Ill. 308, 37 N. E.

[17] This statement of facts has been substituted for that of the original report.

1019; Levy v. Bank, 158 Ill. 88, 42 N. E. 129, 30 L. R. A. 380; and cases from other jurisdictions holding the same rule. No argument seems necessary to show that the doctrine of these cases can have no application to the question at issue. How can it be said that the Missouri property was in any sense a collateral security for appellants' claims, or that it was a fund open to them for the payment of their debts, rather than those of all other creditors? At the time of the death of Ramsey, he owned the property free from any lien whatever in their favor, and it was liable for the payment of all his debts.

It is further contended that appellants are entitled to a preference over other creditors in that property because of some superior diligence on their part. No reason or authority is cited in support of this contention, and none, we think, can be. It was undoubtedly the right of all the creditors of Rufus N. Ramsey to have the Missouri estate, as well as his Illinois property, converted into money and applied in payment of his debts, and it was the duty of the resident administrator to see that that purpose was accomplished. Being a nonresident of the state of Missouri, and therefore disqualified by the statute of that state from taking letters of administration himself, it was his duty to procure administration in the name of a resident. It was undoubtedly, also, the privilege of any creditor to cause such administration. It was also proper for Illinois creditors to file their claims and have them allowed in the probate court of St. Louis, and to cause the real estate there to be sold for the payment of the debts of Rufus N. Ramsey, but not for the payment of the claims probated there alone, because, by the express provisions of the statute of that state, the estate being insolvent, the property found in Missouri was to be so disposed of that all his creditors there and elsewhere should receive an equal share, in proportion to their respective debts. There was no occasion for diligence upon the part of creditors in filing their claims there. They each had a right to rely upon the Missouri statute for protection against the claim now made by appellants.

Upon the death of a person intestate, leaving assets in different states or countries, the administration in the domicile of the deceased is the principal administration, through which, in contemplation of law, assets are to be distributed in payment of his debts. Young v. Wittenmyre, 123 Ill. 303, 14 N. E. 869. Administration in other states or jurisdictions must be held in order to collect the debts and reduce the assets into money, which are known as ancillary or auxiliary administrations. In the absence of statutory provision, it is the duty of the auxiliary administrators to collect the assets, reduce them to money, and transmit them to the principal administrator; or they may, under certain circumstances, pay claims probated there, transmitting only what remains in their hands to the principal administrator. Where, however, the estate is insolvent, it has been held (and we think with reason and justice) that the auxiliary administrator has no right to pay resident claimants, or those who have filed their claims there,

more than their pro rata share of the whole estate. Dawes v. Head, 3 Pick. (Mass.) 128; Davis v. Estey, 8 Pick. (Mass.) 475; Miner v. Austin, 45 Iowa, 221, 24 Am. Rep. 763; 2 Kent, Comm. 434. Manifestly, under section 263 of the Missouri statute, the administrator there had no right to pay these appellants more than their proportionate part of the whole assets, taking into account all seventh-class "creditors, there and elsewhere," even though the property in that state had sold for enough to pay them in full; and, as we have said, every "creditor, there or elsewhere," had a right to rely upon his performing his duty under that statute. He might have complied with the request of appellee, and, after paying the small claims of resident creditors, transmitted the balance of the fund in his hands for distribution. However, his refusal to do so, and the refusal of the St. Louis probate court to order him to do so, did not render it impracticable to still give effect to said section 263 and the provisions of our own statute above quoted.

It is to be observed that these appellants are not content with what the Missouri court gave them, but come into the probate court of Clinton county and demand that they shall be allowed to participate in the assets in the hands of the appellee, the resident administrator. Having done so, we entertain no doubt that the latter court had the power, and that it was its duty, to require them to account for that which they had received under the Missouri administration, and to order a distribution pro rata among all the seventh-class creditors. The judgment of the circuit court to that effect was right, and it was properly affirmed by the appellate court.

Judgment affirmed.[18]

[18] Where the estate as a whole is insolvent, a creditor who has received full payment in the ancillary jurisdiction cannot be compelled by the courts of the domicile of the decedent to refund a part of what he has received. Schneller v. Vance, 8 La. 506, 28 Am. Dec. 140 (1835).

All questions relating to the administration of the estate in the ancillary jurisdiction are governed exclusively by the local law. Goodall v. Marshall, 11 N. H. 88, 35 Am. Dec. 472 (1840); Miner v. Austin, 45 Iowa, 221, 24 Am. Rep. 763 (1876). In the absence of proof that they have received something abroad, foreign creditors are ordinarily allowed to come in pari passu with the local creditors of the same class. In re Kloebe, 1884, 28 Ch. Div. 175; Tyler v. Thompson, 44 Tex. 497, 23 Am. Rep. 600 (1876). But see Shegogg v. Perkins, 34 Ark. 117 (1879).

The ancillary administrator is responsible only to the court that appointed him. In re Crawford, 68 Ohio St. 58, 67 N. E. 156, 96 Am. St. Rep. 648 (1903). His responsibility ceases after the assets have been duly transmitted to the domiciliary administrator. Emery v. Batchelder, 132 Mass. 452 (1882). His accountability does not extend to assets received by him in the state of the principal administration. Fay v. Haven, 3 Metc. (Mass.) 109 (1841).

All questions of priority in the payment of debts, both in the domiciliary and ancillary jurisdictions, are determined by the lex fori. Smith v. Union Bank of Georgetown, 5 Pet. 518, 8 L. Ed. 212 (1831); Pardo v. Bingham [1868] L. R. 6 Eq. 485. Except, perhaps, with respect to foreign assets. Cook v. Gregson, 2 Dr. 286 (1854); Estate of Rowland, 1 N. Y. St. Rep. 308 (1886).

An ancillary administrator may be authorized to sell land for the payment of debts proved within the ancillary jurisdiction, notwithstanding the per-

sonal estate at the domicile of the deceased has not been exhausted. Rosenthal v. Renick, 44 Ill. 202 (1867); Cowden v. Jacobson, 165 Mass. 240, 43 N. E. 98 (1896); Lawrence's Appeal, 49 Conn. 411 (1881).

As to the jurisdiction of a court of ancillary administration to decree an allowance to the widow of a nonresident decedent out of assets within such jurisdiction, see 11 L. R. A. (N. S.) 361–363.

JURISDICTION TO APPOINT ADMINISTRATOR.—See, in general, 24 L. R. A. 684–689.

Jurisdiction to appoint an ancillary administrator is not dependent upon the existence of an administrator at the domicile of the deceased. Stevens v. Gaylord, 11 Mass. 256 (1814); Green v. Rugely, 23 Tex. 539 (1859).

An ancillary administrator may be appointed in any jurisdiction where there are assets belonging to the estate. Jurisdiction has been taken, though the only assets found within the state consisted of choses in action. Jordan v. Chicago & Northwestern R. R. Co., 125 Wis. 581, 104 N. W. 803, 1 L. R. A. (N. S.) 885, 110 Am. St. Rep. 865 (1905).

In such a case, however, the application for the appointment of an ancillary administrator has been denied on the ground that the administration of a decedent's estate should be one as far as possible. Putnam v. Pitney, 45 Minn. 242, 47 N. W. 790, 11 L. R. A. 41 (1891).

Property of an estate administered in another jurisdiction is not assets in the state to which it is subsequently removed. Currie v. Bircham, 1 Dow. & Ry. 35 (1822); Wheelock v. Pierce, 6 Cush. (Mass.) 288 (1850). Whether or not administration can be granted with respect to unadministered property so removed depends upon the terms of the statute upon which the jurisdiction of the particular probate court rests. In favor of such jurisdiction: Green v. Rugely, 23 Tex. 539 (1859); Pinney v. McGregory, 102 Mass. 186 (1869); Turner v. Campbell, 124 Mo. App. 133, 101 S. W. 119 (1907). See, also, In re McCabe, 84 App. Div. 145, 82 N. Y. Supp. 180 (1903), affirmed 177 N. Y. 584, 69 N. E. 1126. Contra: Embry v. Millar, 1 A. K. Marsh. (Ky.) 300, 10 Am. Dec. 732 (1818).

The court of the state where the decedent was domiciled and where all the creditors of the estate reside may enjoin such creditors from petitioning for the appointment of an administrator in another state. In re Williams' Estate, 130 Iowa, 553, 107 N. W. 608 (1906).

Choses in action, for the purpose of administration, are regarded as assets in the state where the debtor resides. Dial v. Gary, 14 S. C. 573, 37 Am. Rep. 737 (1880). The same is true of negotiable paper. Wyman v. Halstead, 109 U. S. 654, 3 Sup. Ct. 417, 27 L. Ed. 1068 (1884). See, also, Moore v. Jordan, 36 Kan. 271, 13 Pac. 337, 59 Am. Rep. 550 (1887). But a voluntary payment of a note will not be sustained, unless the administrator has possession of the instrument. Amsden v. Danielson, 19 R. I. 533, 35 Atl. 70 (1896). Bonds are assets in the state where they are located at the death of their owner. Beers v. Shannon, 73 N. Y. 292 (1878). Judgment debts are held to be assets in the jurisdiction where the judgments are recorded. Anonymous, 8 Mod. 244. Some of the American courts, however, regard them, like simple contract debts, as assets where the debtor resides. Swancy v. Scott, 9 Humph. (Tenn.) 327 (1848); Miller v. Hoover, 121 Mo. App. 568, 97 S. W. 210 (1906). Shares of stock are assets at the domicile of the corporation. Grayson v. Robertson, 122 Ala. 330, 25 South. 229, 82 Am. St. Rep. 80 (1898); Murphy v. Crouse, 135 Cal. 14, 66 Pac. 971, 87 Am. St. Rep. 90 (1901). A policy of insurance constitutes an asset in the state where the debtor resides. A foreign insurance company, for the purpose of this rule, will be regarded as having a residence in every jurisdiction where it is subject to suit, at least where the decedent was domiciled in the latter state, or the policy was therein at the time of the decedent's death. New England Mut. Life Ins. Co. v. Woodworth, 111 U. S. 138, 4 Sup. Ct. 364, 28 L. Ed. 379 (1884); Sulz v. Mutual R. F. L. Ass'n, 145 N. Y. 563, 40 N. E. 242, 28 L. R. A. 379 (1895); New York Life Ins. Co. v. Smith, 67 Fed. 694, 14 C. C. A. 635 (1895); Ellis v. Insurance Co., 100 Tenn. 177, 43 S. W. 766 (1897). If jurisdiction has attached in one state with respect to an insurance policy, comity will cause it to be respected elsewhere. Sulz v. Mutual R. F. L. Ass'n, 145 N. Y. 563, 40 N. E. 242, 28 L. R. A. 379 (1895); Traflet v. Empire Life Ins. Co., 64 N. J. Law, 387, 46 Atl. 204 (1900). It has been held that an insurance

SECTION 2.—GUARDIANS.

LAMAR v. MICOU.

(Supreme Court of the United States, 1884. 112 U. S. 452, 5 Sup. Ct. 221, 28 L. Ed. 751.)

William W. Sims, a citizen of Georgia, died in 1850, leaving a widow and two infant daughters, Martha M. Sims and Ann C. Sims. In 1853, the widow married Rev. Richard M. Abercrombie, and, together with her children, went to reside with him in New York. Upon her petition Gazaway B. Lamar, at that time a resident of Brooklyn, N. Y., was appointed guardian of the person and estate of each child by the surrogate of the county of Richmond, N. Y. Lamar invested in 1856 a part of the moneys belonging to each ward in stock of the Bank of the Republic in New York, and in 1857 a part of such moneys in stock of the Bank of Commerce at Savannah. Several months after Lamar's appointment, in 1856, Mr. and Mrs. Abercrombie removed to Hartford, Conn., taking the children with them, where they resided until their mother's death in 1859. After that the children lived with their grandmother and aunt in Georgia. In 1860 the aunt married Benjamin H. Micou, of Alabama, and the children and the grandmother thereafter lived with Mr. and Mrs. Micou. From 1855–1859, Lamar resided partly in Georgia and partly in New York.

During the Civil War, fearing that the stock in the Bank of the Republic at New York would be confiscated by the United States, Lamar sold it and invested it in guaranteed bonds in the cities of New Orleans, Memphis, and Mobile, and of the East Tennessee & Georgia Railroad Company, depositing the bonds in a bank in Canada. He invested, also, from time to time, the property of his wards that was within the so-called Confederate States in Confederate States

policy is an asset in the state where it is payable. Pritchard v. Standard Life Ins. Co., 7 Ont. Rep. 188.

CONTINENTAL LAW.—Title to both real and personal property, upon the death of the owner, vests under the law of France, Germany, and Italy in the heirs, in accordance with the Roman doctrine of universal succession.

The doctrine that every grant of administration is confined in its authority and operation to the limits of the territory of the government which grants it, and can act beyond such territory only by way of comity, is not recognized. An administrator appointed in England or the United States may sue as the representative of the estate without the need of a previous exequatur. Trib. Civ. Seine, May 12, 1891 (19 Clunet, 487). In accordance with the general rule, however, which requires an exequatur for a foreign judgment or decree, if so-called acts of execution are in question, such exequatur of the decree under which he was appointed must be obtained before a foreign executor or administrator will be placed in possession of the local assets. French Cass. March 9, 1853 (S. 1853, 1, 269).

bonds, in bonds of the individual states which composed the Confederacy, and in bonds of cities and of railroad corporations.

Martha M. Sims died in 1864, leaving her sister Ann C. Sims as her next of kin. At the suggestion of Lamar and upon the request of Ann C. Sims, Micou was appointed guardian of the property of Ann C. Sims in the state of Alabama. Lamar died in 1874, and Ann C. Sims died in 1878. In June, 1878, Mrs. Micou was appointed administratrix de bonis non of Martha M. Sims in New York, and as such administratrix filed a bill of revivor for an accounting originally filed against Lamar in the Supreme Court of New York by Ann C. Sims as administratrix of Martha M. Sims, and removed to the Circuit Court of the United States for the Southern District of New York. The Circuit Court held all Lamar's investments to have been breaches of trust. A final decree was entered in favor of plaintiff for the sum of $18,705.19. 1 Fed. 14; 7 Fed. 180. The defendant appealed.[19]

GRAY, J.[20] * * * The rules of investment varying so much in the different states, it becomes necessary to consider by what law the management and investment of the ward's property should be governed. As a general rule (with some exceptions not material to the consideration of this case) the law of the domicile governs the status of a person, and the disposition and management of his movable property. The domicile of an infant is universally held to be the fittest place for the appointment of a guardian of his person and estate; although, for the protection of either, a guardian may be appointed in any state where the person or any property of an infant may be found. On the continent of Europe, the guardian appointed in the state of the domicile of the ward is generally recognized as entitled to the control and dominion of the ward and his movable property everywhere, and guardians specially appointed in other states are responsible to the principal guardian. By the law of England and of this country, a guardian appointed by the courts of one state has no authority over the ward's person or property in another state, except so far as allowed by the comity of that state, as expressed through its legislature or its courts; but the tendency of modern statutes and decisions is to defer to the law of the domicile, and to support the authority of the guardian appointed there. Hoyt v. Sprague, 103 U. S. 613, 631, 26 L. Ed. 585, and authorities cited; Morrell v. Dickey, 1 Johns. Ch. (N. Y.) 153; Woodworth v. Spring, 4 Allen (Mass.) 321; Milliken v. Pratt, 125 Mass. 374, 377, 378, 28 Am. Rep. 241; Leonard v. Putnam, 51 N. H. 247, 12 Am. Rep. 106; Com. v. Rhoads, 37 Pa. 60; Sims v. Renwick, 25 Ga. 58; Dicey, Dom. 172–176; Westl. Priv. Int. Law, (2d Ed.) 48–50; Whart. Confl. Laws, (2d Ed.) §§ 259–

[19] This statement of facts has been substituted for that of the original report.

[20] Only a part of the opinion is given.

268. An infant cannot change his own domicile. As infants have the domicile of their father, he may change their domicile by changing his own; and after his death the mother, while she remains a widow, may likewise, by changing her domicile, change the domicile of the infants; the domicile of the children, in either case, following the independent domicile of their parent. Kennedy v. Ryall, 67 N. Y. 379; Potinger v. Wightman, 3 Mer. 67; Dedham v. Natick, 16 Mass. 135; Dicey, Dom. 97–99. But when the widow, by marrying again, acquires the domicile of a second husband, she does not, by taking her children by the first husband to live with her there, make the domicile which she derives from the second husband their domicile; and they retain the domicile which they had, before her second marriage, acquired from her or from their father. Cumner v. Milton, 3 Salk. 259; S. C. Holt, 578; Freetown v. Taunton, 16 Mass. 52; School Directors v. James, 2 Watts & S. (Pa.) 568, 37 Am. Dec. 525; Johnson v. Copeland, 35 Ala. 521; Brown v. Lynch, 2 Bradf. Sur. (N. Y.) 214; Mears v. Sinclair, 1 W. Va. 185; Pot. Introduction Generale aux Coutumes, No. 19; 1 Burge, Col. & Foreign Law, 39; 4 Phillim. Int. Law (2d Ed.) § 97.

The preference due to the law of the ward's domicile, and the importance of a uniform administration of his whole estate, require that, as a general rule, the management and investment of his property should be governed by the law of the state of his domicile, especially when he actually resides there, rather than by the law of any state in which a guardian may have been appointed or may have received some property of the ward. If the duties of the guardian were to be exclusively regulated by the law of the state of his appointment, it would follow that in any case in which the temporary residence of the ward was changed from state to state, from considerations of health, education, pleasure, or convenience, and guardians were appointed in each state, the guardians appointed in the different states, even if the same persons, might be held to diverse rules of accounting for different parts of the ward's property. The form of accounting, so far as concerns the remedy only, must, indeed, be according to the law of the court in which relief is sought; but the general rule by which the guardian is to be held responsible for the investment of the ward's property is the law of the place of the domicile of the ward. Bar, Int. Law, § 106 (Gillespie's Translation,) p. 438; Whart. Confl. Laws, § 259. It may be suggested that this would enable the guardian, by changing the domicile of his ward, to choose for himself the law by which he should account. Not so. The father, and after his death the widowed mother, being the natural guardian, and the person from whom the ward derives his domicile, may change that domicile. But the ward does not derive a domicile from any other than a natural guardian. A testamentary guardian nominated by the father may have the same control of the

ward's domicile that the father had. Wood v. Wood, 5 Paige (N. Y.) 596, 605, 28 Am. Dec. 451. And any guardian, appointed in the state of the domicile of the ward, has been generally held to have the power of changing the ward's domicile from one county to another within the same state and under the same law. Cutts v. Haskins, 9 Mass. 543; Holyoke v. Haskins, 5 Pick. (Mass.) 20, 16 Am. Dec. 372; Kirkland v. Whately, 4 Allen (Mass.) 462; Anderson v. Anderson, 42 Vt. 350, 1 Am. Rep. 334; Ex parte Bartlett, 4 Bradf. Sur. (N. Y.) 221; The Queen v. Whitby, L. R. 5 Q. B. 325, 331. But it is very doubtful, to say the least, whether even a guardian appointed in the state of the domicile of the ward (not being the natural guardian or a testamentary guardian) can remove the ward's domicile beyond the limits of the state in which the guardian is appointed, and to which his legal authority is confined. Douglas v. Douglas, L. R. 12 Eq. 617, 625; Daniel v. Hill, 52 Ala. 430; Story Confl. Laws, § 506, note; Dicey, Dom. 100, 132. And it is quite clear that a guardian appointed in a state in which the ward is temporarily residing, cannot change the ward's permanent domicile from one state to another. The case of such a guardian differs from that of an executor of, or a trustee under, a will. In the one case, the title in the property is in the executor or the trustee; in the other, the title in the property is in the ward, and the guardian has only the custody and management of it, with power to change its investment. The executor or trustee is appointed at the domicile of the testator; the guardian is most fitly appointed at the domicile of the ward, and may be appointed in any state in which the person or any property of the ward is found. The general rule which governs the administration of the property in the one case may be the law of the domicile of the testator; in the other case, it is the law of the domicile of the ward.

As the law of the domicile of the ward has no extraterritorial effect, except by the comity of the state where the property is situated, or where the guardian is appointed, it cannot, of course, prevail against a statute of the state in which the question is presented for adjudication, expressly applicable to the estate of a ward domiciled elsewhere. Hoyt v. Sprague, 103 U. S. 613, 26 L. Ed. 585. Cases may also arise with facts so peculiar or so complicated as to modify the degree of influence that the court in which the guardian is called to account may allow to the law of the domicile of the ward, consistently with doing justice to the parties before it. And a guardian, who had in good faith conformed to the law of the state in which he was appointed, might, perhaps, be excused for not having complied with stricter rules prevailing at the domicile of the ward. But in a case in which the domicile of the ward has always been in a state whose law leaves much to the discretion of the guardian in the matter of investments, and he has faithfully and prudently exer-

cised that discretion with a view to the pecuniary interests of the ward, it would be inconsistent with the principles of equity to charge him with the amount of the moneys invested, merely because he has not complied with the more rigid rules adopted by the courts of the state in which he was appointed. The domicile of William W. Sims, during his life and at the time of his death in 1850, was in Georgia. This domicile continued to be the domicile of his widow and of their infant children until they acquired new ones. In 1853 the widow, by marrying the Rev. Mr. Abercrombie, acquired his domicile. But she did not, by taking the infants to the home, at first in New York and afterwards in Connecticut, of her new husband, who was of no kin to the children, was under no legal obligation to support them, and was, in fact, paid for their board out of their property, make his domicile, or the domicile derived by her from him, the domicile of the children of the first husband. Immediately upon her death in Connecticut, in 1859, these children, both under 10 years of age, were taken back to Georgia to the house of their father's mother and unmarried sister, their own nearest surviving relatives; and they continued to live with their grandmother and aunt in Georgia until the marriage of the aunt in January, 1860, to Mr. Micou, a citizen of Alabama, after which the grandmother and the children resided with Mr. and Mrs. Micou at their domicile in that state.

Upon these facts, the domicile of the children was always in Georgia from their birth until January, 1860, and thenceforth was either in Georgia or in Alabama. As the rules of investment prevailing before 1863 in Georgia and in Alabama did not substantially differ, the question in which of those two states their domicile was is immaterial to the decision of this case; and it is therefore unnecessary to consider whether their grandmother was their natural guardian, and as such had the power to change their domicile from one state to another. See Hargrave's note 66 to Co. Litt. 88b; Reeve, Dom. Rel. 315; 2 Kent, Comm. 219; Code Ga. 1861, §§ 1754, 2452; Darden v. Wyatt, 15 Ga. 414. Whether the domicile of Lamar in December, 1855, when he was appointed in New York guardian of the infants, was in New York or in Georgia, does not distinctly appear, and is not material; because, for the reasons already stated, wherever his domicile was, his duties as guardian in the management and investment of the property of his wards were to be regulated by the law of their domicile. * * *

The result is that both the decrees of the Circuit Court in this case must be reversed, and the case remanded for further proceedings in conformity with this opinion.[21]

[21] The rules determining the rights and duties of foreign guardians with respect to the property of their wards do not differ materially from those applicable to foreign administrators. See 89 Am. St. Rep. 271–275; 13 Am. & Eng. Enc. Law, 968–973; 21 Cyc. 265–272; Minor, Conflict of Laws, § 116.

With respect to the rights of guardians, foreign and domestic, to the cus-

tody of the ward, see 89 Am. St. Rep. 274–278; 13 Am. & Eng. Enc. Law, 967–968; 21 Cyc. 264; Minor, Conflict of Laws, § 115.

With respect to jurisdiction to appoint guardians, see 21 Cyc. 23–26; 7 Col. Law Rev. 348–350.

CONTINENTAL LAW.—*France and Italy.*—Jurisdiction to appoint guardians is on principle deemed to belong exclusively to the courts of the country of which the ward, lunatic, or spendthrift is a subject. App. Paris, Dec. 12, 1863 (S. 1864, 2, 20). A temporary guardian, however, may be appointed and provisional measures may be taken until the courts of his country act. *France.*—App. Nancy, April 25, 1885 (D. 1886, 2, 131); Cass. Nov. 10, 1896 (S. 1900, 1, 516). *Italy.*—Cass. Turin, June 13, 1874 (1 Clunet, 330). But see App. Milan, July 5, 1901 (Monitore 1901, p. 688). Jurisdiction will be assumed, also, if the party in question has no known domicile in the country of which he is a subject, so that a refusal to take jurisdiction would be tantamount to a denial of justice. Trib. Civ. Seine, April 6, 1894 (21 Clunet, 531). But not if such guardianship is unknown to the national law. App. Paris, July 31, 1895 (23 Clunet, 147).

Subject to the rules concerning public order, a foreign guardian can exercise all the rights vested in him under the law of the state in which he was appointed. *France,* App. Paris, June 27, 1888 (17 Clunet, 946); App. Orléans, Feb. 9, 1900 (S. 1902, 2, 141). *Italy,* Article 6, Prel. Disp. Civ. Code; App. Genoa, Dec. 31, 1889 (Temi Genovese 1889, p. 85); App. Casale, April 15, 1902 (Foro It. 1902, 1, 912). This is true, even with respect to realty. App. Pau, July 9, 1907 (35 Clunet, 183).

Ordinarily no exequatur of the decree is necessary to entitle him to the enjoyment of such rights, unless, of course, acts of execution are in question. *France,* App. Nancy, April 25, 1885 (D. 1886, 2, 131). *Italy,* App. Orléans, Feb. 9, 1900 (S. 1900, 2, 14); article 944, Code Civ. Proc.

So whether the ward has a lien upon the property of his guardian as a protection against mismanagement depends upon his national law. App. Bordeaux, July 23, 1897 (S. 1900, 2, 89), and note by E. Audinet. As a "strictly civil right," however, it will, in the absence of treaty or an authorized domicile, not exist in favor of a foreigner with respect to property in France. See Cass. May 20, 1862 (S. 1862, 1, 673).

Germany.—A foreigner of age may be placed under guardianship in Germany according to German law, if he is domiciled in the country, or if, possessing no domicile in any country, he resides in Germany. Article 8, Law Intr. Civ. Code. A guardian may be appointed in Germany for a foreign minor, if the state of which he is a subject fails to provide one for him. The need of a guardian, however, is to be determined in this case in accordance with his national law. Article 23, Law Intr. Civ. Code; K. G. June 23, 1902 (12 Niemeyer, 468); K. G. Feb. 23, 1903 (13 Niemeyer, 420). O. L. G. Jena, May 8, 1907 (18 Niemeyer, 180).

The above rules are subject to the provisions of the Convention of the Hague of June 12, 1902. See Appendix A, III. In regard to guardianship for persons of age, see, also, Draft of Convention, signed at the Hague July 17, 1905 (Appendix B, III).

SECTION 3.—RECEIVERS AND TRUSTEES IN BANKRUPTCY.

GREAT WESTERN MINING & MFG. CO. v. HARRIS.

(Supreme Court of the United States, 1905. 198 U. S. 561, 25 Sup. Ct. 770, 49 L. Ed. 1163.)

This case was begun by a bill in equity, filed in the Circuit Court of the United States for the District of Vermont against B. D. Harris, a citizen of Vermont, by L. C. Black, receiver of the Great Western Mining & Manufacturing Company, a corporation organized under the laws of Kentucky. A decree was rendered in favor of the receiver, which was reversed by the Circuit Court of Appeals for the Second Circuit. Plaintiff sued out a writ of certiorari.[22]

DAY, J. The theory of the complainant's case seems to be that the transfers of the stock of the defendant and other directors and stockholders, paid for out of the proceeds of the bonds, in view of the allegations of the bill as to the condition of the company, and the purposes in view by the defendant and associates, amounted to a breach of duty upon the part of the defendant and other directors, and a conversion to their own use of the property of the company, for which they should be held to account in an action brought by the company, through its receiver, under the order of the circuit court of Kentucky. The particulars of the suit in which the receiver was appointed are not very fully set forth, but enough appears to show that he was appointed in a suit to adjudicate and enforce liens, and subject the property to the payment of the claims of creditors. In the brief of the learned counsel for complainant, it is styled a "general creditors' and foreclosure suit." It does not appear that, by order of the court or otherwise, there has been any conveyance of the property and assets of the company to the receiver, nor has the corporation been dissolved, and the receiver made its successor, entitled to its property and assets. The minute books of the company, in evidence do not show any authority by the corporation for the filing of this bill in the name of the Great Western Mining & Manufacturing Company or otherwise, although meetings were held after the appointment of the receiver. Nor is our attention called to any statute vesting the title of the corporation in the receiver. So far, then, as the receiver is concerned, his right to prosecute the action must depend upon his powers as such officer of the court and the order of the court, set forth in the statement of facts, authorizing him to bring suit against the stockholders, and directors for the purpose of realizing the assets, either in his own name or that

[22] This statement of facts has been substituted for that of the original report.

of the corporation, as may be proper. This condition of the record brings up for consideration at the threshold of this case the question of the extent of the power of the receiver to maintain this action under the order of the court, either in his own name or that of the company. As to the power of the court to authorize the receiver to sue, we think the case is ruled by Booth v. Clark, 17 How. 322, 338, 15 L. Ed. 170, in which case the authority of the court to authorize a receiver appointed in one jurisdiction to sue in a foreign jurisdiction was the subject of very full consideration. In that case it was held that a receiver is an officer of the court which appoints him, and, in the absence of some conveyance or statute vesting the property of the debtor in him, he cannot sue in courts of a foreign jurisdiction upon the order of the court which appointed him, to recover the property of the debtor. While that case was decided in 1854, its authority has been frequently recognized in this court, and as late as Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380, it was said by Mr. Justice Peckham, who delivered the opinion of the court:

"We do not think anything has been said or decided in this court which destroys or limits the controlling authority of that case."

In that case the following language, as to a receiver's powers, from Booth v. Clark, 17 How. 338, 15 L. Ed. 171, is quoted with approval:

"He has no extraterritorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity, a privilege to sue in a foreign court or another jurisdiction, as the judgment creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek."

Mr. Justice Wayne, who delivered the opinion of the court in Booth v. Clark, stated, among others, the following reasons for refusing to recognize the powers of a receiver in foreign jurisdictions:

"We think that a receiver could not be admitted to the comity extended to judgment creditors without an entire departure from chancery proceedings as to the manner of his appointment, the securities which are taken from him for the performance of his duties, and the direction which the court has over him in the collection of the estate of the debtor, and the application and distribution of them. If he seeks to be recognized in another jurisdiction, it is to take the fund there out of it, without such court having any control of his subsequent action in respect to it, and without his having even official power to give security to the court, the aid of which he seeks, for his faithful conduct and official accountability. All that could be done upon such an application from a receiver, according to chancery practice, would be to transfer him from the locality of his appointment to that where he asks to be recognized, for the

execution of his trust in the last, under the coercive ability of that court; and that it would be difficult to do, where it may be asked to be done, without the court exercising its province to determine whether the suitor, or another person within its jurisdiction, was the proper person to act as receiver."

It will thus be seen that the decision in Booth v. Clark rests upon the principle that the receiver's right to sue in a foreign jurisdiction is not recognized upon principles of comity, and the court of his appointment can clothe him with no power to exercise his official duties beyond its jurisdiction. The ground of this conclusion is that every jurisdiction, in which it is sought, by means of a receiver, to subject property to the control of the court, has the right and power to determine for itself who the receiver shall be, and to make such distribution of the funds realized within its own jurisdiction as will protect the rights of local parties interested therein, and not permit a foreign court to prejudice the rights of local creditors by removing assets from the local jurisdiction without an order of the court, or its approval as to the officer who shall act in the holding and distribution of the property recovered. In Quincy M. & P. R. Co. v. Humphreys, 145 U. S. 82, 12 Sup. Ct. 787, 36 L. Ed. 632, the powers of a receiver were under consideration, and the following language was quoted with approval (145 U. S. 98, 12 Sup. Ct. 792, 36 L. Ed. 637): "The ordinary chancery receiver, such as we have in this case, is clothed with no estate in the property, but is a mere custodian of it for the court, and by special authority may become an officer of the court to effect a sale of the property, if that be deemed necessary for the benefit of the parties concerned." There are exceptional cases, such as Relfe v. Rundle (Life Asso. of America v. Rundle) 103 U. S. 222, 26 L. Ed. 337,[23] in which the entire property of the insolvent company was vested in the superintendent of insurance of the state, where his authority did not come from the decree of the court, and his right to sue was maintained. In Hawkins v. Glenn, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184, it appeared that Glenn had derived title by assignment and deed, and he was permitted to sue. In the case now before us it does not appear that the receiver had any other title to the assets and property of the company than that derived from his official relation thereto as receiver under the order of the court. In such a case we think the doctrine of Booth v. Clark is fully applicable. It is doubtless because of the doctrine therein declared that the practice has become general in the courts of the United States, where the property of a corporation is situated in more than one jurisdiction, to appoint ancillary receivers of the property in such separate jurisdictions. It is true that the ancillary receiverships are generally conducted in harmony with the court of original jurisdiction, but such receivers are appointed with

[23] See, also, Bernheimer v. Converse, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163 (1907).

a view of vesting control of property rights in the court in whose jurisdiction they are located. If the powers of a chancery receiver in the federal courts should be extended so as to authorize suits beyond the jurisdiction of the court appointing him, to recover property in foreign jurisdictions, such enlargement of authority should come from legislative, and not judicial, action.

Nor do we think the jurisdiction is established because the action is authorized to be instituted by the receiver in the name of the corporation. Such actions subjecting local assets to a foreign jurisdiction and to a foreign receivership would come within the reasoning of Booth v. Clark. If a recovery be had, although in the name of the corporation, the property would be turned over to the receiver, to be by him administered under the order of the court appointing him.

It is urged that jurisdiction in this case is sustained by the case of Great Western Teleg. Co. v. Purdy, 162 U. S. 329, 16 Sup. Ct. 810, 40 L. Ed. 986, in which it was held that the assets and affairs of an insolvent corporation being in the hands of a receiver, the court might direct the calls or assessments upon delinquent shareholders who had not paid for their shares, thereby using the authority the directors might have exercised before the appointment of the receiver. In that case, a receiver appointed by the circuit court of Cook county, in Illinois, under the direction of that court brought an action in the name of the Great Western Telegraph Company, an Illinois corporation, by its receiver, against Purdy, a citizen of Iowa, to recover a sum alleged to be due from him upon an assessment upon his stock subscription, and it was held that the Illinois court might make the assessment and calls necessary to collect the stock which would be binding in another court. The jurisdiction of the Iowa court was not called in question in the state court of Iowa, where the original action was brought, nor was the question of jurisdiction raised in this court, or passed upon in deciding the case. While not detracting from the authority of that case as to the matter decided, we see nothing in it to indicate that, had the question herein presented been made, it would have been decided otherwise than herein indicated.

There are numerous and conflicting decisions in the state courts as to the rights of a receiver to sue in a foreign jurisdiction upon principles of comity, which it is not necessary to review here. In this court, since the case of Booth v. Clark, 17 How. 338, 15 L. Ed. 170, we deem the practice to be settled, and to limit a receiver, who derives his authority from his appointment as such, to actions, either in his own name or that of an insolvent corporation, such as may be authorized within the jurisdiction wherein he was appointed.

We think the Circuit Court of Appeals was right in holding that the Circuit Court had no jurisdiction of this action.

This view of the case renders it unnecessary to consider the other questions made in the record.

Decree affirmed.

Mr. Justice BREWER concurs in the decree.

Holds: that out of county, if the receiver is only attempting to collect credits, it is not attempting to take anything from local creditors; then RE of the preceding case would do no good, it only facilitate the Courts

this case permits this N.J. receiver to sue in N.J.

HURD v. CITY OF ELIZABETH.

(Supreme Court of New Jersey, 1879. 41 N. J. Law, 1.)

The plaintiff brought this suit in his character of receiver of the Third Avenue Savings Bank. The allegations touching his right to sue were the following: "For that the said S. H. Hurd heretofore, to wit, on the thirtieth day of November, eighteen hundred and seventy-five, at the city of Kingston, in the state of New York, to wit, at Elizabeth, in said county of Union, was duly appointed receiver of the Third Avenue Savings Bank, by the Supreme Court of the state of New York, in pursuance of the laws of said state of New York, and afterwards, to wit, on the day and year last aforesaid, duly qualified as such receiver, and thereupon became empowered to exercise and perform all the powers and duties imposed upon him as receiver as aforesaid, by virtue of the laws of the state of New York and said appointment, and particularly by said laws and his said appointment, became seized and possessed of the personal property and choses in action of the said the Third Avenue Savings Bank, and entitled to sue for, collect and receive all moneys then due to the said the Third Avenue Savings Bank, and particularly the several sums hereinafter mentioned."

The declaration then showed, in the form of common counts, sundry moneys due, antecedently to the receivership, to the savings bank, and concluded in the usual style. The defendant demurred.

BEASLEY, C. J.[24] The plaintiff's right to stand as the actor in this suit is derived wholly from the receivership that was conferred upon him by the Supreme Court of the state of New York; and on the part of the defendant, such right is contested on the ground that it is contrary to established rules for the courts here to lend their assistance in carrying into effect an office created in the course of a proceeding before a foreign tribunal. To countenance this contention various authorities are cited, and notably among them that of Booth v. Clark, 17 How. 322, 15 L. Ed. 164. But that case belongs to a train of decisions which have been undoubtedly rightly decided, but which are not to be regarded as ruling the precise point now in issue. The decisions thus referred to will be found in High on Receivers, § 239, and they are all cases involving a controversy between the receiver and the creditors of the person whose property has been placed under the control of such receiver. In such a posture of things it is manifest that different considerations should have force from those that are to control when the litigation does not involve the rights of creditors in opposition to the claims of the receiver. That the officer of a foreign court should not be permitted, as against the claims of creditors resident here, to remove from this state the assets of the

[24] A part of the opinion relating to a point of pleading has been omitted.

debtor, is a proposition that appears to be asserted by all the decisions; but that, similarly, he should not be permitted to remove such assets when creditors are not so interested, is quite a different affair, and it may, perhaps, be safely said that this latter doctrine has no direct authority in its favor. There are certainly dicta that go even to that extent, so that text-writers seem to have felt themselves warranted in declaring that the powers of an officer of this kind are strictly circumscribed by the jurisdictional limits of the tribunal from which he derives his existence, and that he will not be recognized as a suitor outside of such limits. But I think the more correct definition of the legal rule would be that a receiver cannot sue, or otherwise exercise his functions, in a foreign jurisdiction whenever such acts, if sanctioned, would interfere with the policy established by law in such foreign jurisdiction. There seems to be no reason why this should not be the accepted principle. When there are no persons interested but the litigants in a foreign jurisdiction, and it becomes expedient, in the progress of such suit, that the property of one of them, wherever it may be situated, should be brought in and subjected to such proceeding, I can think of no objection against allowing such a power to be exercised. It could not be exercised in a foreign jurisdiction to the disadvantage of creditors resident there, because it is the policy of every government to retain in its own hands the property of a debtor until all domestic claims against it have been satisfied. But beyond this precaution, why should any restraint be put upon the foreign procedure? The question thus raised has nothing to do with that other inquiry that is frequently discussed in the books, whether a receiver at common law is in point of fact clothed with the power to sue in a foreign jurisdiction; that is a subject standing by itself, for the present argument relates to a case in which the officer is authorized, so far as such power can be given by the tribunal appointing him, to gather in the assets, both at home and abroad. Conceding that the officer is invested with this fullness of authority, it would appear to be in harmony with those legal principles by which the intercourse of foreign states is regulated for every government, when its tribunals are appealed to, to render every assistance in its power in furtherance of the execution of such authority, except in those cases when, by so doing, its own policy would be displaced or the rights of its own citizens invaded or impaired. After completely protecting its own citizens and laws, the dictates of international comity would seem to require that the officer of the foreign tribunal should be acknowledged and aided. The appointment of a receiver, with full powers to collect the property of a litigant, wherever the same might be found, should be deemed to operate as an assignment of such property to be enforced everywhere, subject to the exception just defined. Such a rule, is, I think, both practicable and just. If A., being the only creditor of B., should sue him in a court of this state, and the exigencies of justice should require that the property of B., wherever the

same might be situated, should be put under the control of the forum in which the proceedings were pending, and such receiver should be appointed and should be legally clothed with the requisite authority to sue for, and take possession of such property, I can find nothing in the rules or of good policy that should permit the debtors of B. to set up that such judgment has no extraterritorial force. To sanction such a plea would be to frustrate, as far as possible the foreign procedure, simply for the purpose of doing so, the single result being that a court would be baffled, and perhaps prevented from doing justice. Such ought not to be the legal attitude of governments towards each other. To the extent to which this subject has been involved, it has, I think, been properly disposed of in the adjudications already made in this state. Thus in Varnum v. Camp, 13 N. J. Law, 326, 25 Am. Dec. 476, it was decided that an instrument efficient at the domicil of the maker to transfer his property could not dispose, in a manner inconsistent with the policy of our laws, of his movables situate here. In this case the duty of comity was admitted but the decision was put upon the ground that this state was not required, by force of such duty, to abandon an established policy of its own in favor of a different policy prevalent in another jurisdiction. Moore v. Bonnell, 31 N. J. Law, 90, was decided on a similar principle, and it has this additional feature, that while it in a general way rejects the control of the foreign policy, it does this only to the extent rendered necessary for the purpose of self-protection, for, beyond this limit, it gives effect to and enforces the foreign law. And the same disposition to co-operate, as far as practicable, in sustaining an alien policy is exhibited in the case of Normand's Administrator v. Grognard, 17 N. J. Eq. 425. The foregoing view will be found to be in accord with the following cases: Hoyt v. Thompson, 5 N. Y. 320; Runk v. St. John, 29 Barb. (N. Y.) 585; Taylor v. Columbian Insurance Co., 14 Allen (Mass.) 353.

In view of these considerations and authorities my conclusion is, that the legal effect of the appointment of a receiver in a foreign jurisdiction in transferring to him the right to collect the property passing under his control by virtue of such office, will be so far recognized by the courts of this state as to enable such officer to sustain a suit for the recovery of such property. * * *[25]

[25]Accord: Bank v. McLeod, 38 Ohio St. 174 (1882); Small v. Smith, 14 S. D. 621, 86 N. W. 649, 86 Am. St. Rep. 808 (1901).

But if receiver once gets title to property, then he can take it anywhere - for he has title

CHICAGO, M. & ST. P. RY. CO. v. KEOKUK N. L. PACKET CO.

(Supreme Court of Illinois, 1884. 108 Ill. 317, 48 Am. Rep. 557.)

This was an attachment suit, brought by the Chicago, Milwaukee & St. Paul Railway Company, against the Keokuk Northern Line Packet Company, in the circuit court of Adams county, in this state. The writ of attachment was, on the 21st day of April, 1881, levied upon the barge G. W. Duncan, lying at Quincy, in said county, as the property of the defendant. Samuel C. Clubb, under the provision of section 29 of our attachment act, "that any person other than the defendant claiming the property attached may interplead," etc., interpleaded in the case, claiming the property so attached, under an appointment as receiver of the property and effects of said packet company, by the circuit court of St. Louis, in the state of Missouri, in a certain cause in said court wherein said packet company was defendant. There was judgment in favor of the interpleader, Clubb, which, on appeal, was affirmed by the Appellate Court for the Third District, and the railway company appealed to this court.

The plaintiff in the attachment suit had first filed a replication to the pleas of the interpleader, traversing the same, but afterward, on its motion granted by the court, it withdrew the replication, as having been filed by mistake, and then moved the court to file its plea in abatement, which had been intended to be filed instead of the replication, denying the right to interplead as receiver under the appointment of a foreign court, which motion the court overruled, whereupon said plaintiff company filed the plea in abatement, which plea the court, on motion of said Clubb, ordered to be stricken from the files. The plaintiff company then refiled its said replication, upon which issue was joined and the trial had. The interpleader's first plea alleges the barge was his own property at the time of the attachment of it; the second, that it was his property as receiver; the third, that at such time it was in his possession as receiver.

The facts of the case shown by the evidence are, that at the October term, 1880, of the circuit court of the city of St. Louis, in the state of Missouri, Samuel C. Clubb was duly appointed receiver of the Keokuk Northern Line Packet Company, an insolvent corporation of that state, with power and authority to take possession of all the business and property of the corporation, and to manage the affairs thereof, under the orders of the court, the receiver giving bond in the sum of $200,000 for the faithful discharge of his duties. At the time of such appointment the barge G. W. Duncan, in question, was lying at the landing at St. Louis, within the state of Missouri, and within the jurisdiction of said court. The receiver immediately took possession of the barge, and afterward, on the 6th day of November, 1880, he chartered the barge to the steamer E. W. Cole, for a trip up the Mississippi river and return. The barge was taken, under the charter,

up the river as far as Quincy, Illinois, where it was detained by the ice, and remained until the levy of the writ of attachment in this case upon it on the 21st day of April, 1881. At the request of the captain of the steamer E. W. Cole, the receiver released him from the charter, and took possession of the barge at Quincy, and ever since, until the levy of the attachment, retained such possession, having a watchman over and guarding the barge against danger. The receiver made an effort to have the barge removed to St. Louis as soon as the river was clear of ice, having made a contract with a steamboat line for the purpose, but did not succeed in having the removal made before the attachment. The court which appointed the receiver, at its April term, 1881, made an order authorizing the receiver to intervene in the attachment suit, and take the necessary steps to secure possession of the barge.

SHELDON, C. J. We will consider the case as properly presenting by the pleadings the question of the right to interplead in the suit in the capacity of receiver.

The general doctrine that the powers of a receiver are coextensive only with the jurisdiction of the court making the appointment, and particularly that a foreign receiver should not be permitted, as against the claims of creditors resident in another state, to remove from such state the assets of the debtor, it being the policy of every government to retain in its own hands the property of a debtor until all domestic claims against it have been satisfied, we fully concede; and were this the case of property situate in this state, never having been within the jurisdiction of the court that appointed the receiver, and never having been in the possession of the receiver, it would be covered by the above principles, which would be decisive against the claim of the appellee. But the facts that the property at the time of the appointment of the receiver was within the jurisdiction of the court making the appointment, and was there taken into the actual possession of the receiver, and continued in his possession until it was attached, take the case, as we conceive, out of the range of the foregoing principles. We are of opinion that by the receiver's taking possession of the barge in question within the jurisdiction of the court that appointed him, he became vested with a special property in the barge, like that which a sheriff acquires by the seizure of goods in execution, and that he was entitled to protect this special property while it continued, by action, in like manner as if he had been the absolute owner. Having taken the property in his possession, he was responsible for it to the court that appointed him, and had given a bond in a large sum to cover his responsibility as receiver, and to meet such liability he might maintain any appropriate proceeding to regain possession of the barge which had been taken from him. Boyle v. Townes, 9 Leigh (Va.) 158; Singerly v. Fox, 75 Pa. 114. It is well settled that a sheriff does, by the seizure of goods in execution, acquire a special property in them, and that he may maintain trespass, trover or replevin for them.

It is claimed that there was here an abandonment of the barge by leasing it and suffering it to be taken out of the state—that the purpose in so doing was an unlawful one, and a gross violation of official duty. We do not so view it. The receiver was, by his appointment, authorized to manage the affairs of the corporation under the orders of the court. The business of the corporation was running boats on the Mississippi river, and chartering the barge for a trip up that river was but continuing the employ of the barge in the business of the corporation, and therefrom making an increase of the assets to be distributed among the creditors. Brownell v. Manchester, 1 Pick. (Mass.) 233, decides that a sheriff in the state of Massachusetts, who had attached property in that state, did not lose his special property by removing the attached property into the state of Rhode Island for a lawful purpose. Dick v. Bailey et al., 2 La. Ann. 974, 46 Am. Dec. 561, holds otherwise in respect to property attached in Mississippi, and sent by the sheriff into Louisiana for an illegal purpose. It is laid down in Drake on Attachment (5th Ed.) § 292, that the mere fact of removal by an officer of attached property beyond his bailiwick into a foreign jurisdiction, without regard to the circumstances attending it, will not dissolve the attachment; that if the purpose was lawful, and the possession continued, the attachment would not be dissolved; but if the purpose was unlawful, though the officer's possession remained, or if lawful and he lost his possession, his special property in the goods would be divested—citing the two cases above named. We do not consider that there was any unlawful purpose here in the chartering and employing of the barge, as was done.

It is insisted the possession of the barge was lost. There was certainly evidence tending to show possession by the receiver up to the time of the attachment, and in support of the judgment of the Appellate Court we must presume that it found the existence of all the facts necessary to sustain the judgment, where there was evidence tending to show their existence, and that court's finding of fact is conclusive upon us. By taking the barge into his possession within the jurisdiction of the court that appointed him, a special property in the barge became vested in the receiver, and it is the established rule that where a legal title to personal property has once passed and become vested in accordance with the law of the state where it is situated, the validity of such title will be recognized everywhere. Caniwell v. Sewell, 5 Hurl. & N. 728; Clark v. Connecticut Peat Co., 35 Conn. 303; Taylor v. Boardman, 25 Vt. 581; Crapo v. Kelly, 16 Wall. 610, 21 L. Ed. 430; Waters v. Barton, 1 Cold. (Tenn.) 450.

Under this rule we hold that where a receiver has once obtained rightful possession of personal property situated within the jurisdiction of his appointment, which he was appointed to take charge of, he will not be deprived of its possession, though he take it, in the performance of his duty, into a foreign jurisdiction; that while there it cannot be taken from his possession by creditors of the insolvent debtor

who reside within that jurisdiction. Where a receiver of an insolvent manufacturing corporation, appointed by a court in New Jersey, took possession of its assets, and for the purpose of completing a bridge which it had contracted to build in Connecticut, purchased iron with the funds of the estate and sent it to that state, it was decided that the iron was not open to attachment in Connecticut by a creditor residing there. Pond v. Cooke, 45 Conn. 126, 29 Am. Rep. 668. And where C. was appointed, by a court in Arkansas, receiver of property of T., a defendant in a suit, and ordered to ship it to Memphis for sale, and to hold the proceeds subject to the order of the court, and did so ship it to Memphis, where it was attached by creditors of T., it was held that C. could maintain an action of replevin for the property in Tennessee. Cagill v. Wooldridge, 8 Baxt. (Tenn.) 580, 35 Am. Rep. 716; Killner v. Hobart, 58 How. Pr. (N. Y.) 452, decides that receivers appointed in another state, and operating a railway as such, but having property in their hands as receivers in New York, cannot there be sued—that an attachment issued in such suit will be vacated.

This is not the case of the officer of a foreign court seeking, as against the claims of creditors resident here, to remove from this state assets of the debtor situate here at the time of the officer's appointment, and ever since, and of which he had had no previous possession. It is to such a case as that, as we understand, that the authorities cited by appellant's counsel apply, and not to a case like the present, where the property was, at the time of the appointment of the foreign receiver, within the jurisdiction of the appointing court, and there taken into the receiver's possession, and subsequently suffered by him to be brought into this state in the performance of his duty, and his possession here wrongfully invaded, and he seeking but redress for such invasion.

The judgment of the Appellate Court must be affirmed.

Judgment affirmed.[26]

[26] Accord: Pond v. Cooke, 45 Conn. 126, 29 Am. Rep. 668 (1877); Robertson v. Stead, 135 Mo. 135, 36 S. W. 610, 33 L. R. A. 203, 58 Am. St. Rep. 569 (1896); Woodhull v. Farmers' Trust Co., 11 N. D. 157, 90 N. W. 795, 95 Am. St. Rep. 712 (1902). Contra: Humphreys v. Hopkins, 81 Cal. 551, 22 Pac. 892, 6 L. R. A. 792, 15 Am. St. Rep. 76 (1889).

So whenever a receiver sues in his own right, and not in a representative capacity. Wilkinson v. Culver (C. C.) 25 Fed. 639 (1885).

In the absence of statute a receiver can be sued in the state of appointment only with the permission of the court appointing him. People v. Brooks, 40 Mich. 333, 29 Am. Rep. 534 (1879).

As to whether or not he may be sued in another state without such leave, and as to the effect of such omission, see Barton v. Barbour, 104 U. S. 126, 26 L. Ed. 672 (1881); Phelan v. Ganebin, 5 Colo. 14 (1879); Pruyn v. McCreary, 105 App. Div. 302, 93 N. Y. Supp. 995 (1905), affirmed 182 N. Y. 568, 75 N. E. 1133 (1905).

A judgment obtained against a receiver of one jurisdiction is not binding upon him with respect to assets held by him as receiver in another jurisdiction. Reynolds v. Stockton, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464 (1891).

Between courts of concurrent jurisdiction the court first acquiring jurisdiction over the res has exclusive jurisdiction for the purposes of the litigation

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HUNTER v. POTTS.

(Court of King's Bench, 1791. 4 Term R. 182.)

Action for money had and received. Blanchard & Lewis, bankrupts, were indebted to defendant on a contract made in England. All the parties were residents of England. After the issuing of the commission of bankruptcy and the making of the assignment the defendant, with full knowledge thereof, caused the effects of the bankrupt found in Rhode Island, U. S. A., to be attached and collected the sum of £496. 12s. 9d. and costs. This action is brought by the assignees to recover this sum.[27]

Lord KENYON, C. J. In the argument in this case, many quotations were made from the writers on the civil law, which it is not necessary to consider in determining this question. Generally speaking, it must be admitted, that personal property must be governed by the laws of that country where the owner is domiciled. Neither do we mean to break through the rule that the courts of one country ought to pay a proper deference to the decision of the courts in another having competent jurisdiction, where the facts on which the decision was made were fairly disclosed to such court; but the general question here is, Whether the assignment which was executed by the commissioners of the bankrupt, was sufficient to vest the bankrupt's property in the plantations abroad, in the assignees under the commission?—because, if it did so vest at the time of the assignment, it is immaterial to consider in this case, how far the relation under the bankrupt laws should take effect in Rhode Island, since the assignment was executed anterior to the time when the attachment suit was there commenced. Therefore, the only question here is, Whether or not the property in that island passed by the assignment in the same manner as if the owner (the bankrupt) had assigned it by his voluntary act? And that it does so pass cannot be doubted, unless there were some positive law of that country to prevent it. Every person having property in a foreign country, may dispose of it in this: though, indeed, if there be a law in that country directing a particular mode of conveyance, that must be adopted; but in this case, no law of that kind is stated; and we cannot conjecture that it was not competent to the bankrupt himself, prior to the bankruptcy, to have disposed of his property as he pleased. Now the bankrupt statutes have expressly enacted, that

before it. Shields v. Coleman, 157 U. S. 168, 15 Sup. Ct. 570, 39 L. Ed. 660 (1895). So where possession is necessary to the relief asked. Adams v. Mercantile Trust Co., 66 Fed. 617, 15 C. C. A. 1 (1895), and Judge Woods, in Wilmer v. Atlanta, etc., R. Co., 2 Woods, 409, Fed. Cas. No. 17,775 (1875). To the effect that actual seizure of the property is necessary, see Justice Bradley, in Wilmer v. Atlanta, etc., R. Co., 2 Woods, 423, Fed. Cas. No. 17,775 (1875).

[27] This statement of facts has been substituted for that of the original report.

the commissioners may assign all the property of the bankrupt in the most extensive words; and, therefore, on the general reason of the thing, if there be no positive decision to the contrary, no doubt could be entertained but that, by the laws of this country, uncontradicted by the laws of any other country where personal property may happen to be, the commissioners of a bankrupt may dispose of the personal property of a bankrupt resident here, though such property be in a foreign country. Then let us consider the decisions which have been made on this subject. The case of McIntosh v. Ogilvie, H. 21 Geo. II, in Chancery: "The plaintiff was the assignee of a bankrupt, the defendant a creditor, who before the bankruptcy went into Scotland, and made arrestments on debts due to the bankrupt from persons there. Upon an affidavit of the defendant's having got this money into his hands, a ne exeat was granted; and a motion was now made on the behalf of the defendant to discharge it, upon a supposition that he had a right to the goods as creditor by his arrestments. The Lord Chancellor asked, whether he had sentence before the bankruptcy; and being answered in the negative, he said, 'Then it is like a foreign attachment, by which this court will not suffer a creditor to gain priority, if no sentence were pronounced before the bankruptcy. I cannot grant a prohibition to the Court of Session; but I will certainly make an order on the party here to restrain him from getting a priority, and evading the laws of bankruptcy here. If the gentleman were not going abroad, I would do nothing; but as he is, I will not discharge the writ without his giving security to abide the event of the cause.' N. B. The Solicitor General said there had been cases where creditors had got a priority; and after coming here, have been obliged to refund in a court of law in an action for money had and received" agrees with our opinion. There it is to be observed, that Lord Hardwicke, on his being told that the defendant in that case had not obtained a sentence before the bankruptcy, said, "Then it is like a foreign attachment, by which this court will not suffer a creditor to gain priority, if no sentence were pronounced before the bankruptcy." In another part he intimated a strong opinion that the property in Scotland should not be taken by one creditor to the prejudice of the rest of the creditors here; and at the close of that case the Solicitor General observed, that this precise question had been determined. But the case of Beckford v. Turner was relied on, when this case was first argued, as a determination in favor of the attachment creditor; but certainly no question of that kind was stated among the reasons assigned by the counsel, nor was it brought in judgment in that case; the single question there was, Whether or not the proceedings in the island of Jamaica were conformable to the mode pointed out by the act of assembly there? and if it had been stated in the reasons signed in that case, this question could not have arisen in deciding it. There was, indeed, a dictum, rather

than a decision, in Wilson's Case, that the assignment by the commissioners had no other effect than a voluntary assignment. I believe the doubt in all these cases has arisen from not attending to the meaning of the word "voluntary." It has been contended that it means "without a valuable consideration"; but it is impossible to consider it in that light; for in the case of a bankruptcy there must be a consideration; it means the bankrupt's own voluntary act, as contradistinguished from a compulsory act by law. Therefore on the reason of the thing, even without any authorities, we have no difficulty in saying that the title of the plaintiffs must prevail. For it must be remembered, that during the progress of this business all these parties resided in England; that the defendant, knowing of the commission and of the assignment, in order to gain a priority, transmitted an affidavit to Rhode Island to obtain an attachment of the bankrupt's property there, in violation of the rights of the rest of the creditors, which were then vested; but such an attempt cannot be sanctioned in a court of law. But, in addition to these reasons, the decisions which have been made on this subject remove all doubts whatever. It is not necessary to go through them, because they were mentioned in the argument, and are collected in H. Bl. Rep. C. B. 131, 132, note; Salomons v. Ross, before Lord Bathurst; Jollet and Another v. Deponthien and Barril, before Lord Camden; and Neale and Another v. Cottingham and Another, in Ireland, before Lord Chancellor Lifford. The second of these I have reason to believe was considered by Lord Camden as a very clear case; for he did not think it important enough even to make a note of it in his book; and although the last case was not decided in this country, yet it was determined by a very respectable authority, Lord Lifford, assisted by several of the judges, and that noble Lord was conversant with the laws of this country, having sat on the bench here for several years before he went to Ireland, and we know also that Davis' reports of the decisions in that country are cited as authority here. There are therefore these three decisions, in addition to the case before Lord Hardwicke, in support of our opinion; and there are none to the contrary, except indeed what was said in Wilson's Case; and that seems to have turned on mistaking the import of the word "voluntary."

We are therefore clearly of opinion that the plaintiffs are entitled to judgment.[28]

[28] See, also, Sill v. Worswick, 1 H. Bl. 665 (1791); Phillips v. Hunter, 2 H. Bl. 402 (1795).

If English creditors obtain satisfaction of their claims by means of a foreign judgment in rem they may retain the fruits as against the liquidator. Minna Craig S. S. Co. v. Chartered Mercantile Bank of India [1897] 1 Q. B. 55. Foreign creditors, it would seem, cannot be held by the trustee in any event. But if they have obtained part payment out of assets that pass to the trustee, they must account for what they received before they will be allowed to prove for the balance in the English bankruptcy proceedings. Ex parte Wilson [1872] L. R. 7 Ch. 490; Banco de Portugual v. Waddell [1880] 5 App.

Matter of Accounting of WAITE.

(Court of Appeals of New York, 1885. 99 N. Y. 433, 2 N. E. 440.)

EARL, J.[29] On the 15th day of October, 1881, Haynes & Sanger, a firm doing business in the city of New York, having become insolvent, made a general assignment for the benefit of their creditors to Charles Waite, who was a member of the firm of Pendle & Waite, and in their assignment preferred that firm as creditors for a large amount. Pendle & Waite did business in New York and London; Waite being a citizen of this country, residing in the city of New York, and having charge of the business of his firm there, and Pendle being a citizen of England and having charge of the firm business there. That firm became insolvent and suspended business in England in February, 1882, and Waite then went to England, and there he and Pendle filed a petition in the London court of bankruptcy, in which they recited their inability to pay their debts in full, and that they were "desirous of instituting proceedings for the liquidation of their affairs by arrangement or composition with their creditors, and hereby submit to the jurisdiction of this court in the matter of such proceeding." Waite signed the petition in person, and through his counsel at once secured the appointment of Schofield as receiver in bankruptcy of the firm property.

Liquidation by arrangement or composition is a proceeding under the English bankruptcy act, which provides that the filing of such a petition is an act of bankruptcy; that a compromise proposition may be made by a debtor, and that if such proposition shall be accepted by the creditors at a general meeting, and then confirmed at a second general meeting, and registered by the court, it becomes binding, and may be carried out under the supervision of the court; that if it appears to the court, on satisfactory evidence, that a composition cannot, in consequence of legal difficulties, or for any other sufficient cause, proceed without injustice or undue delay to the creditors or the debtor, the court may adjudge the debtor a bankrupt, and proceedings may be had accordingly; and that the title of the trustee in bankruptcy, when appointed, relates back to the time of the commission of the act of bankruptcy.

For reasons which it is unnecessary now to consider or relate, the composition failed, and then, upon the application of creditors, which was opposed by Waite, Pendle & Waite were adjudged bankrupts, and Schofield was appointed trustee of the firm property. By the English law the due appointment of a trustee in bankruptcy, under the Eng-

Cas. 161. Neither English nor foreign creditors need account for what they have received in a foreign jurisdiction out of property that did not pass to the assignee (e. g. real estate). Cockerell v. Dickens, 3 Mo. P. C. 98 (1840).

See, in general, Dicey, Conflict of Laws, 435–443; Westlake, Priv. Int. Law, 168–171.

[29]A part of the opinion has been omitted.

lish bankruptcy act, transfers to the trustee all the personal property of the bankrupt, wherever situated, whether in Great Britain or elsewhere.

Notwithstanding his bankruptcy, Waite continued to act as assignee of Haynes & Sanger, and converted the assets of that firm into money, and, under the preference given to his firm, paid himself for the firm of Pendle & Waite the sum of $14,333.70. He paid no portion of that sum to Pendle or to the creditors of his firm, the American creditors of such firm having been fully paid from other assets of the firm.

After all this, Waite filed his petition in the court of common pleas of the city of New York for a settlement of his accounts as assignee, and citations were issued, served, and published for that purpose, and a referee was appointed to take and state his accounts. In his accounts he entered and claimed a credit for the sum paid to himself as above stated. Schofield, through his attorney, appeared upon the accounting, and as trustee objected to the credit, and claimed that that sum should be paid to him. The referee ruled that the law of this state does not recognize the validity of foreign bankruptcy proceedings to transfer title to property of the bankrupt situated here, and for that reason held that the payment by Waite as assignee to himself, as a member of the firm of Pendle & Waite, was valid, and that he was entitled to the credit claimed. The same view of the law was taken at the special and general terms of the common pleas, and then Schofield appealed to this court.

We have stated the facts as found by the referee and as the respondent did not and could not except to the findings, and is therefore in no condition to complain of them, we must assume that they were based upon sufficient evidence.

The transfer of the property of Pendle & Waite to Schofield, as trustee, was in invitum solely by operation of the English bankrupt law. While the proceeding first instituted by the bankrupts to arrange a composition with their creditors was voluntary, the final proceeding through which the adjudication in bankruptcy was had, and the trustee appointed, was adversary and against their will, having no basis of voluntary consent to rest on. Willitts v. Waite, 25 N. Y. 577. If the transfer effected by the bankruptcy proceedings is to have the same effect here as in England, then the title to the money due to the bankrupts from Haynes & Sanger was vested in the trustee. Schofield was appointed receiver of the property of the bankrupts in March, 1882, and then the title passed out of them. That title continued in him as receiver until he was appointed trustee. After he was appointed receiver, and before or after he was appointed trustee, (which does not appear,) Waite, as assignee, paid himself, as a member of the firm of Pendle & Waite, the sum of money in controversy. He had notice of the bankruptcy proceedings, and knew that the title to the money due from Haynes & Sanger, and from himself as their assignee, had passed out of the bankrupts to Schofield, and hence he had no right to

make payment to them. Schofield became substituted in their place, and Waite was bound to make payment to him, and cannot, therefore, have credit for a payment wrongfully made; and Schofield, standing in the place of the original creditors of Haynes & Sanger, had the right to appear upon the accounting and object to the erroneous payment made in disregard of his rights. But the alleged payment was merely formal, not real. Waite, the assignee, still has the money, and is accountable for it to the proper party. It is not perceived how it can be claimed that Schofield was bound at any time before the accounting to make any demand upon the assignee. He was a creditor, holding the claim originally due to Pendle & Waite, and as such he could appear upon the accounting with all the rights of any other creditor to protect his interests, and he could not be prejudiced by a payment alleged to have been made by the assignee to himself. All this is upon the assumption that the transfer to Schofield, as trustee, is to have the same force and effect here as against the bankrupts as in England; and whether it must have, is the important and interesting question to be determined upon this appeal. It matters not that Waite was a citizen of this country, domiciled here. He went to England, and invoked and submitted to the jurisdiction of the bankruptcy court there, and is bound by its adjudication to the same extent as if he had been domiciled there. The adjudication estopped him just as every party is estopped by the adjudication of a court which has jurisdiction of his person and of the subject-matter.

We have not a case here where there is a conflict between the foreign trustee and domestic creditors. So far as appears, no injustice whatever will be done to any of our own citizens, or to any one else, by allowing the transfer to have full effect here. Indeed, justice seems to require that this money should be paid to the foreign trustee for distribution among the foreign creditors of the bankrupts. The effect to be given in any country to statutory in invitum transfers of property through bankruptcy proceedings in a foreign country has been a subject of much discussion among publicists and judges, and unanimity of opinion has not been, and probably never will be, reached. We shall not enter much into the discussion of the subject, and thus travel over ground so much marked by the footsteps of learned jurists. Our main endeavor will be to ascertain what, by the decisions of the courts of this state, has become the law here.

[The learned justice here examined Bird v. Caritat, 2 Johns. 342, 3 Am. Dec. 433, Raymond v. Johnson, 11 Johns. 488, Holmes v. Remsen, 4 Johns. Ch. 460, 8 Am. Dec. 581, Holmes v. Remsen, 20 Johns. 229, 11 Am. Dec. 269, Plestoro v. Abraham, 1 Paige, 236, Abraham v. Plestoro, 3 Wend. 538, 20 Am. Dec. 738, Johnson v. Hunt, 23 Wend. 87, Hoyt v. Thompson, 5 N. Y. 320, Id., 19 N. Y. 207, Willitts v. Waite, 25 N. Y. 577.]

From all these cases the following rules are to be deemed thoroughly recognized and established in this state: (1) The statutes

of foreign states can in no case have any force or effect in this state ex proprio vigore, and hence the statutory title of foreign assignees in bankruptcy can have no recognition here solely by virtue of the foreign statute. (2) But the comity of nations, which Judge Denio in Peterson v. Chemical Bank, 32 N. Y. 21, 88 Am. Dec. 298, said is a part of the common law, allows a certain effect here to titles derived under and powers created by the laws of other countries, and from such comity the titles of foreign statutory assignees are recognized and enforced here, when they can be, without injustice to our own citizens, and without prejudice to the rights of creditors pursuing their remedies here under our statutes: provided, also, that such titles are not in conflict with the laws or the public policy of our state. (3) Such foreign assignees can appear, and, subject to the conditions above mentioned, maintain suits in our courts against debtors of the bankrupt whom they represent, and against others who have interfered with or withheld the property of the bankrupt.

If it be admitted, as it must be under the authorities cited, that Schofield can, as assignee of Pendle & Waite, have a standing in our courts, and that his title will be so far recognized here that he can sue the debtors of that firm to recover the amount owing to the firm, why may he not sue the bankrupts? If the assignee could sue Haynes & Sanger to recover what they owed the bankrupts, why can he not be permitted to sue the bankrupts for money or property placed in their hands to pay the debt? If he could sue Haynes & Sanger, why could he not sue their assignee, although a member of the bankrupt firm, to recover the money placed in his hands to pay their debt? No principle of justice, no public policy, requires the courts of this state to ignore the title of this assignee at the instance of one of the bankrupts. No injustice will be done to Waite if this money be taken to pay his creditors, and public policy does not require that the courts of this state should protect him in his efforts either to cheat his creditors or his partner. If it be conceded, as it must be, that the title of a foreign statutory assignee is good in this state for any purpose against anybody, it seems to us that it ought to be held good against the bankrupt, against whom an adjudication in bankruptcy has been pronounced which is binding upon him.

Before such an adjudication can be held to be efficacious in a foreign country to transfer title to property, the bankrupt court must have had jurisdiction of the bankrupt either because made in the country of his domicile, or because he, although domiciled elsewhere, submitted to the jurisdiction, or in some other way came under the jurisdiction of the bankrupt court. Here Pendle & Waite did most of their business in England. Most of their assets and of their creditors were there, and while Pendle alone was domiciled there, Waite went there and submitted to the jurisdiction of the bankrupt court, and exposed himself to the operation of English law.

He is therefore bound by the adjudication of the court as he would have been if domiciled there and the judgment had been in a common-law court upon any personal cause of action.

The decisions in the federal courts and in most of the other states are in harmony with the views we have expressed, and so are the doctrines of all the great jurists who have written upon the subject of private international law. 2 Bell, Comm. 681, 687; Wheat. Int. Law (8th Ed. by Dana) §§ 89–91, 144, and note; 2 Kent, Comm. 405; Whart. Confl. Laws, §§ 353, 368, 391, 735, 736; Story, Confl. Laws, §§ 403, 410, 412, 414, 420, 421.

There are but two cases in this state which really hold anything in conflict with these views, and they are Mosselman v. Caen, 34 Barb. 66; Mosselman v. Caen, 4 Thomp. & C. 171. In the first case the action was by foreign trustees appointed in bankruptcy proceedings to recover goods in the possession of the defendant in this country, and the plaintiffs recovered. The defendant appealed, and sought to reverse the judgment upon the ground that the plaintiffs did not, as trustees, have any title to the property. The judgment was affirmed on the ground that the defendant did not raise the question of title at the trial. But the judges writing were of opinion that the plaintiffs did not have any title to the bankrupt's property located here, and one of them (Sutherland, J.) stated that the case of Abraham v. Plestoro, 3 Wend. 538, 20 Am. Dec. 738, confirmed by Johnson v. Hunt, 23 Wend. 87, "would seem to be conclusive upon the question whether our courts will recognize or enforce a right or title acquired under a foreign bankrupt law or foreign bankruptcy judicial proceedings. The case of Abraham v. Plestoro was certainly very broad in its repudiation of foreign bankruptcy proceedings, and went much further than the case of Holmes v. Remsen, 20 Johns. 229, 11 Am. Dec. 269; but I think it must be deemed conclusive authority for saying that had the defendant raised the question by demurrer, or on the trial, it must have been held that the plaintiffs could not maintain this action." In the second case, Davis, P. J., writing the opinion of the court, said: "It seems to be the settled law of this state that our courts will not recognize or enforce a right or title acquired under a foreign bankrupt law or foreign proceedings so far as affects property within their jurisdiction or demands against residents of the state." These two cases are unsupported by authority, and are, we think, opposed to sound principles, and are in conflict with the current of authority in this state.

We are therefore of opinion that Schofield was competent to appear upon the accounting to protect the interests of the bankrupt estate which he represented; and that, upon the facts as they appear in this record, his objection to the allowance of the payment made by the assignee to himself ought to have prevailed, and that he should be recognized as a creditor for the amount of such payment. It follows that the orders of the general and special terms should be reversed,

and as the facts may be varied, or more fully presented upon a new hearing, the matter should be remitted to the special term for further proceedings upon the same or new evidence in accordance with the rules of law herein laid down; and that the appellant should recover from the respondent costs of the appeals to the general term, and to this court. All concur.

Ordered accordingly.

SECURITY TRUST CO. v. DODD, MEAD & CO.

(Supreme Court of the United States, 1899. 173 U. S. 624, 19 Sup. Ct. 545, 43 L. Ed. 83.)

This was an action originally instituted in the district court for the Second judicial district of Minnesota, by the Security Trust Company, as assignee of the D. D. Merrill Company, a corporation organized under the laws of Minnesota, against the firm of Dodd, Mead & Co., a partnership resident in New York, to recover the value of certain stereotyped and electrotyped plates for printing books, upon the ground that the defendants had unlawfully converted the same to their own use. The suit was duly removed from the state court to the Circuit Court of the United States for the District of Minnesota, and was there tried. Upon such trial the following facts appeared:

The D. D. Merrill Company having become insolvent and unable to pay its debts in the usual course of business, on September 23, 1893, executed to the Security Trust Company, the plaintiff in error, an assignment under and pursuant to the provisions of chapter 148 of the Laws of 1881 of the state of Minnesota, which assignment was properly filed in the office of the clerk of the district court. The trust company accepted the same, qualified as assignee, took possession of such of the property as was found in Minnesota, and disposed of the same for the benefit of creditors, the firm of Dodd, Mead & Co. having full knowledge of the execution and filing of such assignment.

At the date of this assignment the D. D. Merrill Company was indebted to Dodd, Mead & Co. of New York, in the sum of $1,249.98, and also to Alfred Mudge & Sons, a Boston copartnership, in the sum of $126.80, which they duly assigned and transferred to Dodd, Mead & Co., making the total indebtedness to them $1,376.78.

Prior to the assignment the D. D. Merrill Company was the owner of the personal property for the value of which this suit was brought. This property was in the custody and possession of Alfred Mudge & Sons at Boston, Mass., until the same was attached by the sheriff of Suffolk county, as hereinafter stated.

The firm of Alfred Mudge & Sons was, prior to March 8, 1894, informed of the assignment by the Merrill Company, and at about

the date of such assignment a notice was served upon them by George E. Merrill to the effect that he (Merrill) took possession of the property in their custody for and in behalf of the Security Trust Company, assignee aforesaid.

On March 8, 1894, Dodd, Mead & Co. commenced an action against the D. D. Merrill Company in the superior court of the county of Suffolk upon their indebtedness, caused a writ of attachment to be issued, and the property in possession of Mudge & Sons seized upon such writ. A summons was served by publication in the manner prescribed by the Massachusetts statutes, although there was no personal service upon the Merrill Company. The Security Trust Company, its assignee, was informed of the bringing and pendency of this suit, and the seizure of the property, prior to the entering of a judgment in said action, which judgment was duly rendered August 6, 1894, execution issued, and on September 27, 1894, the attached property was sold at public auction to Dodd, Mead & Co., the execution creditors, for the sum of $1,000.

Upon this state of facts the Circuit Court of Appeals certified to this court the following questions:

"First. Did the execution and delivery of the aforesaid deed of assignment by the D. D. Merrill Company to the Security Trust Company, and the acceptance of the same by the latter company, and its qualification as assignee thereunder, vest said assignee with the title to the personal property aforesaid, then located in the state of Massachusetts, and in the custody and possession of said Alfred Mudge & Sons?

"Second. Did the execution and delivery of said assignment and the acceptance thereof by the assignee, and its qualification thereunder, in the manner aforesaid, together with the notice of such assignment which was given, as aforesaid, to Alfred Mudge & Sons prior to March 8, 1894, vest the Security Trust Company with such a title to the personal property aforesaid on said March 8, 1894, that it could not on said day be lawfully seized by attachment under process issued by the superior court of Suffolk county, Massachusetts, in a suit instituted therein by creditors of the D. D. Merrill Company, who were residents and citizens of the state of New York, and who had notice of the assignment, but had not proven their claim against the assigned estate nor filed a release of their claim?"

BROWN, J.[30] This case raises the question whether an assignee of an insolvent Minnesota corporation can maintain an action in the courts of Minnesota for the conversion of property formerly belonging to the insolvent corporation, which certain New York creditors had attached in Massachusetts, and sold upon execution against such corporation. The question was also raised upon the argument how far an assignment executed in Minnesota, pursuant to the general as-

[30] A part of the opinion has been omitted.

signment law of that state, by a corporation there resident, is available to pass personal property situated in Massachusetts, as against parties resident in New York, who, subsequent to the assignment, had seized such property upon an attachment against the insolvent corporation.

The assignment was executed under a statute of Minnesota, the material provisions of which are hereinafter set forth. The instrument makes it the duty of the assignee "to pay and discharge, in the order and precedence provided by law, all the debts and liabilities now due or to become due from said party of the first part, together with all interest due and to become due thereon, to all its creditors who shall file releases of their debts and claims against said party of the first part, according to chapter 148 of the General Laws of the State of Minnesota for the year 1881, and the several laws amendatory and supplementary thereof; and, if the residue of said proceeds shall not be sufficient to pay said debts and liabilities and interest in full, then to apply the same, so far as they will extend, to the payment of said debts and liabilities and interest, proportionately on their respective amounts, according to law and the statute in such case made and provided; and if, after the payment of all the costs, charges, and expenses attending the execution of said trust, and the payment and discharge in full of all the said debts of the party of the first part, there shall be any surplus of the said proceeds remaining in the hands of the party of the second part, then, third, repay such surplus to the party of the first part, its successors and assigns."

The operation of voluntary or common-law assignments upon property situated in other states has been the subject of frequent discussion in the courts, and there is a general consensus of opinion to the effect that such assignments will be respected, except so far as they come in conflict with the rights of local creditors, or with the laws or public policy of the state in which the assignment is sought to be enforced. The cases in this court are not numerous, but they are all consonant with the above general principle. Black v. Zacharie, 3 How. 483, 11 L. Ed. 690; Livermore v. Jenckes, 21 How. 126, 16 L. Ed. 55; Green v. Van Buskirk, 5 Wall. 307, 18 L. Ed. 599; Hervey v. Locomotive Works, 93 U. S. 664, 23 L. Ed. 1003; Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538; Barnett v. Kinney, 147 U. S. 476, 13 Sup. Ct. 403, 37 L. Ed. 247.

But the rule with respect to statutory assignments is somewhat different. While the authorities are not altogether harmonious, the prevailing American doctrine is that a conveyance under a state insolvent law operates only upon property within the territory of that state, and that with respect to property in other states it is given only such effect as the laws of such state permit, and that, in general, it must give way to claims of creditors pursuing their remedies there. It passes no title to real estate situated in another state.

Nor, as to personal property, will the title acquired by it prevail against the rights of attaching creditors under the laws of the state where the property is actually situated. Harrison v. Sterry, 5 Cranch, 289, 302, 3 L. Ed. 104; Ogden v. Saunders, 12 Wheat. 213, 6 L. Ed. 606; Booth v. Clark, 17 How. 322, 15 L. Ed. 164; Blake v. Williams, 6 Pick. (Mass.) 286, 17 Am. Dec. 372; Osborn v. Adams, 18 Pick. (Mass.) 245; Zipcey v. Thompson, 1 Gray (Mass.) 243; Abraham v. Plestoro, 3 Wend. (N. Y.) 538, 20 Am. Dec. 738, overruling Holmes v. Remsen, 4 Johns. Ch. (N. Y.) 460, 8 Am. Dec. 581; Johnson v. Hunt, 23 Wend. (N. Y.) 87; Hoyt v. Thompson, 5 N. Y. 320; Willitts v. Waite, 25 N. Y. 577; Kelly v. Crapo, 45 N. Y. 86, 6 Am. Rep. 35; Barth v. Backus, 140 N. Y. 230, 35 N. E. 425, 23 L. R. A. 47, 37 Am. St. Rep. 545; Weider v. Maddox, 66 Tex. 372, 1 S. W. 168, 59 Am. Rep. 617; Rhawn v. Pearce, 110 Ill. 350, 51 Am. Rep. 691; Catlin v. Silver-Plate Co., 123 Ind. 477, 24 N. E. 250, 8 L. R. A. 62, 18 Am. St. Rep. 338. As was said by Mr. Justice McLean in Oakey v. Bennett, 11 How. 33, 44, 13 L. Ed. 593: "A statutable conveyance of property cannot strictly operate beyond the local jurisdiction. Any effect which may be given to it beyond this does not depend upon international law, but the principle of comity; and national comity does not require any government to give effect to such assignment when it shall impair the remedies or lessen the securities of its own citizens. And this is the prevailing doctrine in this country. A proceeding in rem against the property of a foreign bankrupt, under our local laws, may be maintained by creditors, notwithstanding the foreign assignment." Similar language is used by Mr. Justice Story in his Conflict of Laws (section 414).

The statute of Minnesota, under which this assignment was made, provides in its first section that any insolvent debtor "may make an assignment of all his unexempt property for the equal benefit of all his bona fide creditors, who shall file releases of their demands against such debtor, as herein provided"; that such assignments shall be acknowledged and filed, and, if made within 10 days after the assignor's property has been garnished or levied upon, shall operate to vacate such garnishment or levy at the option of the assignee, with certain exceptions. The second section provides for putting an insolvent debtor into involuntary bankruptcy on petition of his creditors, upon his committing certain acts of insolvency, and for the appointment by the court of a receiver with power to take possession of all his property not exempt, and distribute it among his creditors. Under either section only those creditors receive a benefit from the act who file releases to the debtor of all their demands against him. This statute was held not to conflict with the federal Constitution in Denny v. Bennett, 128 U. S. 489, 9 Sup. Ct. 134, 32 L. Ed. 491.

The construction given to this act by the Supreme Court of Minnesota has not been altogether uniform.

[The learned justice here examined Wendell v. Lebon, 30 Minn. 234, 15 N. W. 109, In re Mann, 32 Minn. 60, 19 N. W. 347, Jenks v. Ludden, 34 Minn. 482, 27 N. W. 188, Covey v. Cutler, 55 Minn. 18, 56 N. W. 255, Hawkins v. Ireland, 64 Minn. 339, 67 N. W. 73, 58 Am. St. Rep. 534, McClure v. Campbell, 71 Wis. 350, 37 N. W. 343, 5 Am. St. Rep. 220, and Franzen v. Hutchinson, 94 Iowa, 95, 62 N. W. 698.]

Notwithstanding the two later cases in Minnesota above cited, we are satisfied that the Supreme Court of that state did not intend to overrule the prior decisions, to the effect that the act was substantially a bankrupt or insolvent law. It is true that in these cases a broader effect was given to this act with respect to property in other states than is ordinarily given to statutory assignments, though voluntary in form. But the court was speaking of its power over its own citizens, who had sought to obtain an advantage over the general creditors of the insolvent by seizing his property in another state. There was no intimation that the prior cases were intended to be overruled, nor did the decisions of the later cases require that they should be.

So far as the courts of other states have passed upon the question, they have generally held that any state law upon the subject of assignments, which limits the distribution of the debtor's property to such of his creditors as shall file releases of their demands, is to all intents and purposes an insolvent law; that a title to personal property acquired under such laws will not be recognized in another state when it comes in conflict with the rights of creditors pursuing their remedy there against the property of the debtor, though the proceedings were instituted subsequent to, and with notice of, the assignment in insolvency. The provision of the statute in question, requiring a release from the creditors in order to participate in the distribution of the estate, operates as a discharge of the insolvent from his debts to such creditors—a discharge as complete as is possible under a bankrupt law. An assignment containing a provision of this kind would have been, in many, perhaps in most, of the states, void at common law. Grover v. Wakeman, 11 Wend. (N. Y.) 187, 25 Am. Dec. 624; Ingraham v. Wheeler, 6 Conn. 277; Atkinson v. Jordan, 5 Ohio, 293, 24 Am. Dec. 281; Burrill, Assignm. 232–256. As was said in Conkling v. Carson, 11 Ill. 508: "A debtor in failing circumstances has an undoubted right to prefer one creditor to another, and to provide for a preference by assigning his effects; but he is not permitted to say to any of his creditors that they shall not participate in his present estate unless they release all right to satisfy the residue of their debts out of his future acquisitions." In Brashear v. West, 7 Pet. 608, 8 L. Ed. 801, an assignment containing a provision of this kind was upheld with apparent reluctance, solely upon the ground that in Pennsylvania, where the assignment was made, it had been treated as valid. If the assignment contain this feature, the fact that it is executed

voluntarily, and not in invitum, is not a controlling circumstance. In some states a foreign assignee under a statutory assignment, good by the law of the state where made, may be permitted to come into such state and take possession of the property of the assignor there found, and to withdraw it from the jurisdiction of that state, in the absence of any objection thereto by the local creditors of the assignor; but in such case the assignee takes the property subject to the equity of attaching creditors, and to the remedies provided by the law of the state where such property is found.

A somewhat similar statute of Wisconsin was held to be an insolvent law in Barth v. Backus, 140 N. Y. 230, 35 N. E. 425, 23 L. R. A. 47, 37 Am. St. Rep. 545, and an assignment under such statute treated as ineffectual to transfer the title of the insolvent to property in New York, as against an attaching creditor there, though such creditor was a resident of Wisconsin. A like construction was given to the same statute of Wisconsin in Townsend v. Coxe, 151 Ill. 62, 37 N. E. 689. It was said of this statute (and the same may be said of the statute under consideration): "It is manifest from these provisions that a creditor of an insolvent debtor in Wisconsin, who makes a voluntary assignment, valid under the laws of that state, can only avoid a final discharge of the debtor from all liability on his debt by declining to participate in any way in the assignment proceedings. He is therefore compelled to consent to a discharge as to so much of his debt as is not paid by dividends in the insolvent proceedings, or take the hopeless chance of recovering out of the assets of the assigned estate remaining after all claims allowed have been paid." To the same effect are Upton v. Hubbard, 28 Conn. 274, 73 Am. Dec. 670; Paine v. Lester, 44 Conn. 196, 26 Am. Rep. 442; Weider v. Maddox, 66 Tex. 372, 1 S. W. 168, 59 Am. Rep. 617; Catlin v. Silver-Plate Co., 123 Ind. 477, 24 N. E. 250, 8 L. R. A. 62, 18 Am. St. Rep. 338; Boese v. King, 78 N. Y. 471.

In Taylor v. Insurance Co., 14 Allen (Mass.) 353, it is broadly stated that "when, upon the insolvency of a debtor, the law of the state in which he resides assumes to take his property out of his control, and to assign it by judicial proceedings, without his consent, to trustees for distribution among his creditors, such an assignment will not be allowed by the courts of another state to prevail against any remedy which the laws of the latter afford to its own citizens against property within its jurisdiction." But the weight of authority is, as already stated, that it makes no difference whether the estate of the insolvent is vested in the foreign assignee under proceedings instituted against the insolvent, or upon the voluntary application of the insolvent himself. The assignee is still the agent of the law, and derives from it his authority. Upton v. Hubbard, 28 Conn. 274, 73 Am. Dec. 670.

While it may be true that the assignment in question is good as between the assignor and the assignee, and as to assenting creditors, to pass title to property both within and without the state, and, in the

absence of objections by nonassenting creditors, may authorize the assignee to take possession of the assignor's property wherever found, it cannot be supported as to creditors who have not assented, and who are at liberty to pursue their remedies against such property of the assignor as they may find in other states. Bradford v. Tappan, 11 Pick. (Mass.) 76; Willitts v. Waite, 25 N. Y. 577; Catlin v. Silver-Plate Co., 123 Ind. 477, 24 N. E. 250, 8 L. R. A. 62, 18 Am. St. Rep. 338, and cases above cited.

We are therefore of opinion that the statute of Minnesota was in substance and effect an insolvent law; was operative as to property in Massachusetts only so far as the courts of that state chose to respect it, and that so far as the plaintiff, as assignee of the D. D. Merrill Company, took title to such property, he took it subservient to the defendants' attachment. It results that the property of the D. D. Merrill Company found in Massachusetts was liable to attachment there by these defendants, and that the courts of Minnesota are bound to respect the title so acquired by them.

The second question must therefore be answered in the negative, and, as this disposes of the case, no answer to the first question is necessary.[31]

[31] A foreign involuntary assignment will not as a matter of comity be allowed to prevail as to creditors who are residents of the state where the property is found. Taylor v. Columbian Ins. Co., 14 Allen (Mass.) 353 (1867). It has been held that it would prevail against all other creditors. Long v. Girdwood, 150 Pa. 413, 24 Atl. 711, 23 L. R. A. 33 (1892). Usually, however, citizens of the other states of the Union are placed upon the same footing with citizens of the state where the property is found. Paine v. Lester, 44 Conn. 196, 26 Am. Rep. 442 (1876); Linville v. Hadden & Co., 88 Md. 594, 41 Atl. 1097, 43 L. R. A. 222 (1898). As to whether such equality is imposed by the federal Constitution, see Blake v. McClung, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. Ed. 432 (1898) and ante, p. 322, note. Some courts have extended the same rights to creditors of the state where the assignment was made. Taylor v. Geary, Kirby (Conn.) 313 (1787); Hibernian Nat'l Bank v. Lacombe, 84 N. Y. 367, 38 Am. Rep. 518 (1881); Rhawn v. Pearce, 110 Ill. 350, 51 Am. Rep. 691 (1884); Barth v. Backus, 140 N. Y. 230, 35 N. E. 425, 23 L. R. A. 47, 37 Am. St. Rep. 545 (1893). Most courts, however, allow the foreign assignment to operate with respect to such creditors. Bagby v. Atlantic, Miss. & Oh. R. Co., 86 Pa. 291 (1878); Gilman v. Ketcham, 84 Wis. 60, 54 N. W. 395, 23 L. R. A. 52, 36 Am. St. Rep. 899 (1893); Linville v. Hadden & Co., 88 Md. 594, 41 Atl. 1097, 43 L. R. A. 222 (1898).

Creditors, who voluntarily become parties to the insolvency proceedings, are bound thereby. Gerding v. East Tennessee Land Co., 185 Mass. 380, 70 N. E. 206 (1904).

A court of equity may enjoin resident creditors from proceeding against the debtor's property in another jurisdiction. Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538 (1890); Dehon v. Foster, 4 Allen (Mass.) 545 (1862); Hawkins v. Ireland, 64 Minn. 339, 67 N. W. 73, 58 Am. St. Rep. 534 (1896). Compare Warner v. Jaffray, 96 N. Y. 248, 48 Am. Rep. 616 (1884), a case of voluntary assignment. In Dehon v. Foster, supra, such injunction was granted notwithstanding the attachment suit was commenced before the institution of proceedings in insolvency. In the later case of Lawrence v. Batcheller, 131 Mass. 504 (1881), it was held, however, that payment obtained in another state under an attachment made prior to the time when the assignment in insolvency took effect could not be recovered by the assignee, and in the case of Batcheller v. National Bank, 157 Mass. 33, 31 N. E. 481 (1892), it was held that such creditor might prove for the balance without being com-

BANK COMMISSIONERS v. GRANITE STATE PROVIDENT ASS'N.

(Supreme Court of New Hampshire, 1901. 70 N. H. 557, 49 Atl. 124, 85 Am. St. Rep. 646.)

CHASE, J. The defendants were incorporated in this state in 1881, and were authorized, among other things, to carry on the business of a building and loan association. Laws 1881, p. 601, c. 233. Upon petition of the plaintiffs, David A. Taggart was appointed assignee of their property and effects March 18, 1896, under the provisions of section 15, c. 162, Pub. St. 1901. He accepted the trust, and has substantially converted all the assets in his possession into cash. The defendants did business in 24 states, and ancillary receivers were appointed in 16 of them. These receivers have also substantially converted the assets received by them into cash. Some of them are ready and willing to remit their balances of cash above expenses, etc., to the assignee, some have refused to remit, and some are undecided whether they will remit or not. The assignee has on hand a sufficient sum of money to pay the expenses of administration in this state and the debts that have been proved here, and leave a balance for distribution among shareholders. The shareholders number over 20,000. More than 3,000 of them reside in New York. The defendants deposited $100,000 with the New York superintendent of banks, in compliance with the provisions of the banking law of the state, in order to secure the privilege of doing business there. An ancillary receiver in that state was appointed in an action brought by the Attorney General, in behalf of the people, for the sequestration and preservation of the assets and property of the defendants in the state, and for an equitable distribution of the same among the persons entitled thereto. Taggart appeared in the action, and claimed that the funds collected by the receiver should be paid to him for distribution. The receiver has realized about $69,000 from the sale of real estate located there, and from collections upon mortgages and other obligations due from

pelled to account for the amount received in the foreign jurisdiction. See, also, Proctor v. National Bank of the Republic, 152 Mass. 223, 25 N. E. 81, 9 L. R. A. 122 (1890), and Chipman v. Manufacturers' Nat. Bank, 156 Mass. 147, 30 N. E. 610 (1892).

As to the effect of a subsequent assignment to the receiver, see Ward v. Connecticut Pipe Mfg. Co., 71 Conn. 345, 41 Atl. 1057, 42 L. R. A. 706, 71 Am. St. Rep. 207 (1899); Zacher v. Fidelity Trust & Safety Vault Co., 106 Fed. 593, 45 C. C. A. 480 (1901); Witters v. Globe Savings Bank, 171 Mass. 425, 50 N. E. 932 (1898), and Catlin v. Wilcox Silver Plate Co., 123 Ind. 477, 24 N. E. 250, 8 L. R. A. 62, 18 Am. St. Rep. 338 (1890).

See, in general, 23 L. R. A. 40–46; 65 L. R. A. 363–369; Minor, Conflict of Laws, §§ 137–138; Hollis R. Bailey, An Assignment in Insolvency and its Effect upon Property and Persons out of the State, 7 Harv. Law Rev. 281–299.

parties in that state, sent to him by the assignee under authority given by this court. He also has received from the superintendent of banks the $100,000 above mentioned. For convenience, the first-named sum is hereinafter designated as the "general fund," and the last-named as the "special fund." Creditors residing in New York have claims amounting to nearly $117,000, and the aggregate par value of the shares of shareholders residing there is upwards of $200,000. The court of that state has adjudged that the receiver pay to Taggart the general fund, less costs, etc., upon his giving an undertaking with sufficient sureties in a sum double the amount so paid, to pay the New York creditors and shareholders the same rates of dividend that are awarded to other creditors and shareholders throughout the country, without deduction on account of payments to the former of dividends from the special fund; or, in default of so doing, to return the general fund to the New York receiver. As to the special fund, the court decreed that, after deducting costs, etc., it should be applied first to the payment of the balance, if any, due New York creditors, and then to the payment of New York shareholders in proportion to their respective claims until paid in full, and, finally, if any balance was left, to pay it to the assignee.

1. One question raised relates to the effect of the decision in the New York case—People v. State Provident Ass'n, 161 N. Y. 492, 55 N. E. 1053. Is this court bound to distribute the fund within its control so that New York shareholders shall receive the same percentage thereof that shareholders outside that state receive, notwithstanding the New York residents, according to that decision, are entitled to additional payments from the funds in that state? It has been decided by the United States Supreme Court that a judgment in a state court against a person appointed receiver ancillary to an appointment by a court of another state binds only the property that is in his custody as receiver within the state in which the judgment is rendered, the court in which primary administration was had retaining the custody of the remainder. Reynolds v. Stockton, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464. In the opinion it is said (140 U. S. 272, 11 Sup. Ct. 778, 35 L. Ed. 470): "Whatever orders, judgments, or decrees may be rendered by the courts of another state in respect to so much of the estate as is within its limits must be accepted as conclusive in the courts of primary administration; and whatever matters are by the courts of primary administration permitted to be litigated in the courts of another state come within the same rule of conclusiveness. Beyond this the proceedings of the courts of a state in which ancillary administration is held are not conclusive upon the administration in the courts of the state in which primary administration is had. And this rule is not changed although a party whose estate is being administered by the courts of one state permits himself or itself to be made a party to the litigation in the other." This court, then, is bound by the New York decision so far as it relates to

the property within the limits of that state, and no further. The appearance of the assignee in the action did not enlarge its binding effect here, for the reason, if for no other, that the issue alleged, heard, and decided in the action related solely to the rights of the parties in the property located in that state. The decision as to the general fund was that all the creditors of the corporation, wherever residing, are entitled to have it distributed among them "upon principles of perfect equality." Upon this point, the court say, citing Blake v. McClung, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. Ed. 432, in support of the proposition: "The courts of one state have no right to favor domestic creditors in the distribution, but it must be made upon the principle that equality is equity." The decision as to the special fund was that it was a trust fund set apart by the defendants for the benefit of the creditors and shareholders residing in New York. The decision is based upon the provisions of the local statute, in compliance with which the defendants deposited the fund with the superintendent of banks to obtain the privilege of doing business in the state. The court say that: "By the act of the corporation itself in availing itself of the benefit of the statute it has devoted this fund to the benefit of the domestic creditors and shareholders, at least so far as to enable them to receive payment upon all their obligations in full. Therefore the application of the fund to their benefit in the first instance does not infringe upon the provision of the federal Constitution that citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." The condition imposed upon the transfer of the general fund to this state was not complied with, and the fund remains in the possession of the New York receiver. Consequently, the question before the court is not attended with complications that might arise if the general fund had been received by the assignee upon the terms stated in the New York judgment. The defendant corporation was incorporated in this state. This was its corporate home. Creditors and shareholders of the corporation, when they became such, wherever the transaction took place, impliedly agreed that in case of insolvency the final settlement of the corporation's affairs should be made in this state, and be governed by the laws of the state. Railroad Co. v. Gebhard, 109 U. S. 527, 3 Sup. Ct. 363, 27 L. Ed. 1020; Hawkins v. Glenn, 131 U. S. 319, 331, 332, 9 Sup. Ct. 739, 33 L. Ed. 184. The provisions of the statute of this state relating to the insolvency of an institution of this kind (Pub. St. 1901, c. 162, §§ 12–25) form a complete system of insolvency law, under which the property of the institution may be placed in the custody of the law, converted into money, and divided among its creditors, and the corporation be practically dissolved. In a case decided at this term (Bank Com'rs v. Security Trust Co., 70 N. H. 536, 49 Atl. 113) it was held that the Legislature intended that the bankruptcy rule, so called, should apply in the proof of secured claims in a proceeding under these provisions; that is, that such a creditor should

be allowed to prove only the balance of his claims above the value of his securities. Applying this principle to the case in hand, and giving the decision in People v. State Provident Ass'n, 161 N. Y. 492, 55 N. E. 1053, full effect, it follows that the creditors and shareholders residing in New York are entitled to prove in this proceeding only the balances of their claims above the payments to which they are entitled under the New York decision. This would have been the result if they had resided in this state, and the special fund had been pledged to them collectively as security for the payment of their respective claims. It is said by the New York court that the transaction by which the fund was lodged with the superintendent of banks was "something more than a mere deposit as security"; that it was "in the nature of a fund held in trust for the benefit of domestic creditors and shareholders." Stating the proposition in another form, the interest of the New York creditors and shareholders in the fund is in the nature of the interest of cestuis que trustent in a trust fund created—First, to pay those of them who are creditors simply their claims in full or proportionately; second, to pay from the balance, if any, those who are shareholders their claims in full or proportionately; and, third, to pay the ultimate balance, if any, to the assignee. The fact that the transaction creating the rights of the creditors and shareholders was in the form of a trust, instead of a pledge, does not make the rule above mentioned any the less applicable to it. The object was security, and the difference is one of words, rather than substance. In either case the creditors and shareholders have the right to have the fund set apart by the defendants for their benefit appropriated accordingly. The insolvency proceeding creates the necessity for a settlement of the trust, the same as for the settlement of pledges. The event upon the happening of which the trust was to be executed has arrived, namely, inability of the defendants to pay their obligations in full. Under these circumstances the statutes of this state require the New York creditors, in common with all other secured creditors, domestic and foreign, to apply the value of their securities to their claims, and prove for the balance. They have the right to prove the claims here, but they must prove them as they are; that is, as secured claims. Goodall v. Marshall, 11 N. H. 88, 35 Am. Dec. 472; Loomis v. Farnum, 14 N. H. 119. When creditors offer their claims for proof, the law of this state says to all alike, "Make the proper allowance for your securities, and the balance will be allowed." If difficulties may arise in some cases in determining the value of securities, there is none in this case. The securities have been converted into cash, and the cash is in the custody of the New York receiver. Creditors have presented claims there amounting to nearly $117,000. There is about $69,000 in the possession of the New York receiver, which must be applied towards the payment of the claims there, since the receiver, under the direction of the court, declines to send the money to the assignee. This

money is applicable in the first instance to the payment of debts. So applying it, there will be a balance of some $48,000 of the New York debts unpaid, and for the payment of this balance the special fund is security. This fund is sufficient to pay the balance and leave about $52,000 for payment of shareholders' claims, leaving a balance of about $148,000, or 74 per cent., of those claims unprovided for if those claims are provable at their par value. These figures are used merely by way of illustration. The facts are not definitely stated in the case, and must be determined at the trial term. The point is that the balances of the shareholders' claims, whatever they may be, are provable in this proceeding, and upon them the owners are entitled to share in the distribution of the funds under the control of this court, in common with all other shareholders, domestic and foreign.

2. There is a special fund in New Jersey, but the facts in relation to it are not reported. If what has been said regarding the New York fund does not dispose of the questions pertaining to the New Jersey fund, the latter must be considered upon a new case.

3. Another question reserved relates to the rights of unsecured shareholders who reside, or have proved claims, in states where there are ancillary receivers, who have not transferred the money in their possession to the assignee for distribution. The statute provides that the remainder of the proceeds of the property, after the payment of the expenses of the assignment and the "debts, claims, and obligations owing by the institution," shall be "divided among the stockholders according to their interests." Pub. St. 1901, c. 162, § 20. The principle that "equity is equality" is here recognized. The division contemplated is one made "upon principles of perfect equality." Blake v. McClung, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. Ed. 432. The statute makes no distinction on account of the residence of shareholders. It regards all alike, wherever they reside. Their interests are represented by the amounts of their claims as allowed in the proceeding. Each shareholder, whether domestic or foreign, is entitled to receive the same percentage upon his claim as every other shareholder receives. Such a division could be more conveniently made if all ancillary receivers would transfer their funds to the assignee. It would be a simple problem to determine what percentage the single fund thus formed would be of the amount of all the claims, and to distribute the fund accordingly. In view of the certainty of such division and the convenience of this method of making it, it seems probable that all ancillary receivers, acting under the direction of the courts appointing them, will forward their funds to the assignee. The case is eminently one that requires the co-operation of all courts which have jurisdiction of any of the funds, in order to attain the object desired by all with the least delay and expense, and the least liability to error. If, however, the funds in any state are withheld for any reason from the assignee, the court here will be obliged to undertake the difficult task of securing indirectly equality

in the distribution. Goodall v. Marshall, 11 N. H. 88, 101, 35 Am. Dec. 472. In that case it will be necessary to ascertain what shareholders receive, or are entitled to receive, dividends in the other states, and the amount of such dividends. If the receiver in any state retains the funds in his possession, and they are sufficient in amount to pay the shareholders who have proved their claims in the state a larger percentage than shareholders generally will be entitled to under the distribution to be made here, such foreign shareholders will not be entitled to any portion of the funds here. For example, if the percentage to which shareholders generally will be entitled proves to be 30, and certain shareholders will receive 35, per cent. from one or more ancillary receivers, they will be entitled to nothing in this proceeding. If they receive only 25 per cent., they will be entitled to receive here an additional 5 per cent. The remarks of the court in a recent English case upon a kindred question are pertinent in this connection. The court said: "No doubt, in a case in which French assets were distributed so as to give French creditors as such priority, in distributing the English assets the court would be astute to equalize the payments, and take care that no French creditors should come in and receive anything till the English creditors had been paid a proportionate amount. But, subject to that, which is for the purpose of doing what is equal and just to all the creditors, I know of no law under which the English creditors are to be preferred to foreigners." In re Kloebe, 28 Ch. Div. 175, 177. See, also, Blake v. McClung, 172 U. S. 239, 257, 19 Sup. Ct. 165, 43 L. Ed. 432. Case discharged.[32]

[32] Under the present national bankruptcy act it is provided that "whenever a person shall have been adjudged a bankrupt by a court without the United States and also by a court of bankruptcy, creditors residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors before creditors who have received a dividend in such courts shall be paid any amounts." Bankr. Act July 1, 1898, c. 541, § 65d, 30 Stat. 563 (U. S. Comp. St. 1901, p. 3448).

Whether an ancillary receiver will remit the local assets in full to the principal receiver, or only the balance left after payment of the claims proved in the ancillary proceedings, is dependent upon the discretion of the court appointing him. Sands v. E. S. Greeley & Co., 88 Fed. 130, 31 C. C. A. 424 (1898). For the protection of domestic creditors it may attach conditions before it will allow a remittance of the assets. People v. Granite Provident Association, 161 N. Y. 492, 55 N. E. 1053 (1900).

As to appointment of ancillary receivers, see Irwin v. Granite State Provident Association, 56 N. J. Eq. 244, 38 Atl. 680 (1897).

See, in general, 6 Am. St. Rep. 185–189; 23 L. R. A. 52–57.

CONTINENTAL LAW.—a. *In General.*—The doctrine of the extraterritorial effect or universality of bankruptcy proceedings is not carried through consistently in any jurisdiction. Jurisdiction has been entertained with respect to foreigners or foreign corporations whose principal place of business was in another country where bankruptcy proceedings were pending. App. Paris, Nov. 10, 1886; App. Nancy, July 12, 1887 (S. 1890, 2, 187); App. Paris, March 7, 1878 (S. 1879, 2, 164). Under the facts of the second case an Italian court, on the other hand, declined to take jurisdiction and gave effect to the foreign judgment by means of an exequatur. App. Milan, Dec. 15, 1876 (S. 1879, 2, 161), and note by E. Dubois.

b. *France.*—If an exequatur has been obtained for the foreign decree of bankruptcy, it will in general have the same effect as would attach to it un-

der the law of the foreign state. App. Bordeaux, July 8, 1891 (D. 1893, 2, 141). The effect will attach only from the time the exequatur is granted. Cass. June 26, 1905 (S. 1905, 1, 433), and note by Ch. Lyon-Caen; App. Paris, Nov. 14, 1901 (29 Clunet, 110). An exequatur will make a foreign composition binding—even upon French creditors who voted against it. Cass. July 21, 1903 (S. 1903, 1, 449), and note by Ch. Lyon-Caen.

It has been held that, by virtue of article 14 of the Civil Code, French creditors and such foreign creditors as have established an authorized domicile in France may attach the local assets and thereby prevent their removal. They will be entitled, however, only to the dividend declared under the foreign bankruptcy proceedings. App. Paris, Aug. 13, 1875 (4 Clunet, 40). See, also, Cass. Nov. 12, 1872 (S. 1873, 1, 17); App. Aix, March 15, 1870 (S. 1870, 2, 97).

In the absence of an exequatur, effect will be given to the foreign decree under which the trustee was appointed to the extent of recognizing the authority of the trustee to represent the creditors of the bankrupt. App. Paris, March 23, 1869 (S. 1869, 2, 172); App. Paris, Feb. 22, 1872 (S. 1872, 2, 90); App. Paris, Dec. 14, 1875 (S. 1876, 2, 70). Such right ceases with the appointment of a trustee in France. App. Orléans, March 27, 1885 (12 Clunet, 178).

An exequatur is required, of course, for all acts of execution, and it has been held to be necessary, also, to give effect to the foreign decree of bankruptcy as contradistinguished from the decree appointing the trustee. Cass. June 26, 1905 (S. 1905, 1, 433), and note by Ch. Lyon-Caen. See, also, App. Paris, Jan. 9, 1907 (34 Clunet, 742).

No exequatur will be granted to a foreign decree of bankruptcy if bankruptcy proceedings are pending also in France. App. Paris, March 7, 1878 (S. 1879, 2, 164), and note by E. Dubois.

Where bankruptcy proceedings are pending both in France and in another country, according to App. Nancy, July 12, 1887 (S. 1890, 2, 187), the estate of the bankrupt will be divided into two distinct masses; each creditor being allowed to prove his claim only in the country where he gave credit to the bankrupt. In App. Montpellier, June 12, 1884 (12 Clunet, 82), on the other hand, a creditor was held entitled to prove his claim in both jurisdictions on the condition, however, that he surrender the dividends received under the foreign bankruptcy proceedings.

c. *Italy.*—The courts are divided as to whether effect should be given to a foreign decree of bankruptcy with respect to property in Italy. In favor of the principle of universality: App. Milan, Dec. 6, 1876 (Annali 1877, 3, 47); App. Milan, Dec. 15, 1876 (S. 1879, 2, 161), and note by E. Dubois; App. Rome, June 15, 1892 (Annali 1883, 3, 253). Contra: App. Genoa, Oct. 23, 1891 (Annali 1892, 3, 15); App. Genoa, March 25, 1892 (Monitore 1892, p. 491); App. Genoa, March 15, 1906 (21 Autran, 812). To the effect that it does not embrace real estate in Italy, see Cass. Turin, April 29, 1871 (Annali 1871, 1, 173).

A foreign trustee will be recognized as the representative of the bankrupt estate, and he may sue as such, without the need of an exequatur for the decree appointing him, as long as no acts of execution are in question. Cass. Turin, Dec. 22, 1884 (Annali 1885, 1, 360); App. Brescia, Aug. 1, 1871 (Annali 1871, 2, 575); App. Milan, Dec. 15, 1876 (S. 1879, 2, 161).

As under the continental law a decree of bankruptcy vests only the power of disposition in the trustee, title to the property remaining in the bankrupt, the bankrupt may dispose of his property until the granting of an exequatur for the foreign decree. Cass. Turin, April 13, 1867 (Annali 1867, 1, 215); Cass. Turin, April 29, 1871 (Annali 1871, 1, 173).

d. *Germany.*—As to jurisdiction over foreigners, see section 238, par. 2, Bankruptcy Law of 1898.

Bankruptcy proceedings in Germany will not embrace property situated in other countries, if the bankrupt had a commercial establishment but not a residence or domicile, in Germany. Section 238, par. 1, Bankruptcy Law. But as a rule German bankruptcy proceedings will include the property of the bankrupt in other countries. Section 1, Bankruptcy Law; 16 R. G. 61 (July 6, 1886). Nevertheless, if a creditor under the law of the state where the property is situated is allowed to attach the property, notwithstanding the

foreign proceedings in bankruptcy, he may retain the advantage so obtained. 54 R. G. 193 (March 28, 1903).

Foreign creditors may come in upon the same terms as domestic creditors. Section 5, Bankruptcy Law.

Under section 237 of the Bankruptcy Law, the property of a bankrupt may be attached in Germany notwithstanding the bankruptcy proceedings abroad. Nor can an exequatur be obtained for the foreign decree, since such a decree is not regarded as a judgment in the sense of section 328, Code Civ. Proc. To this rule, by virtue of paragraph 2, § 237, of the Bankruptcy Law, an exception may be established by the Imperial Chancellor with the assent of the Federal Council. A foreign composition requiring confirmation by the bankruptcy court will therefore be of no effect with respect to the debtor's property in Germany; and this is true, although the attaching creditor has participated in the bankruptcy proceedings and has voted, perhaps, for the discharge. O. L. G. Düsseldorf, Nov. 26, 1891 (4 Niemeyer, 359). See, also, 21 R. G. 7 (March 20, 1888); 15 R. O. H. G. 8 (Nov. 7, 1874).

See, in general, F. P. Contuzzi, Die internationalen Wirkungen des Konkurses, betrachtet vom Standpunkte des italienischen Rechts und der Rechtsprechung, 2 Niemeyer, 441–446; F. P. Contuzzi, De la nécessité d'assurer aux étrangers le même traitement qu'aux nationaux dans la répartition des produits de la faillite, 19 Clunet, 1105–1119; K. Gramming, Die Wirkungen des ausländischen Konkurses auf das Inland nach deutschem Reichsrecht, 5 Niemeyer, 344–363; P. Pic, De la faillite et de la liquidation judiciaire des sociétés commerciales en droit international privé, 19 Clunet, 577–612.

See, also, Draft of Convention signed at the Hague July 17, 1905. (Appendix A, IV.)

APPENDIX.

CONVENTIONS OF THE HAGUE, RELATING TO CONFLICT OF LAWS.

A. CONVENTIONS OF JUNE 12, 1902.[1]

I. MARRIAGE.

Article 1. The right of contracting marriage shall be governed by the national law of each of the parties intending to marry, unless a provision of such law refers expressly to some other law.

Art. 2. The law of the place of celebration may prohibit a marriage of foreigners, if it would be contrary to its provisions concerning:

1. Degrees of consanguinity or affinity with respect to which there is an absolute prohibition.

2. An absolute prohibition on marriage imposed upon parties guilty of adultery for which the marriage of one of them has been dissolved.

3. An absolute prohibition to intermarry, imposed upon persons convicted

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[1]These Conventions were signed by and are actually in force in France, Germany, Italy, and a number of other European powers.

The Drafts of Conventions printed under "Appendix B" were likewise signed by France, Germany, Italy, and other European powers, but are as yet law only in part. Germany ratified those relating to Matrimonial Property and Interdiction (see Appendix B, II & III) May 7, 1908. The draft relating to Bankruptcy, contrary to the others, is not a draft for a general Convention, but is intended to serve merely as the basis for Conventions that may be concluded between the individual states.

Consult, in regard to the above Conventions and the Drafts of Conventions, Actes de la Conférence de la Haye chargée de réglementer diverses matières de Droit International Privé, La Haye, 1893, 1894, 1900, 1904; Deutsche Denkschrift zu den Haager Konventionen von 1905 (18 Niemeyer, 578–606); Bogeng, Die Haager Abkommen über internationales Privat- und Zivilrecht, 1908; Buzzati, Tratado di diritto internazionale private secondo le convenzioni dell' Aja, vol. I, Introduzione, Il matrimonio, 1908; Contuzzi, Commentaire théorique et pratique des Conventions de la Haye concernant la codification du droit international privé, vol. I, 1904. Kahn, Die dritte Haager Staatenkonferenz für Internationales Privatrecht, 12 Niemeyer, 1–21, 201–261, 385–437; Lainé, La Conférence de la Haye relative au Droit International Privé (1st session) 21 Clunet, 5–25, 236–255; (2d session) 22 Clunet, 465–484, 734–751; (3d session) 28 Clunet, 5–35, 231–253, 918–935; (4th session) 32 Clunet, 797–815, 33 Clunet, 5–26, 278–301, 976–994, 34 Clunet, 897–921; Missir, La Quatrième Conférence de Droit International de la Haye, (1) Projet d'une convention concernant les conflits de lois relatifs aux effets du mariage sur les droits et les devoirs des époux dans leurs rapports personnels et sur les biens des époux, 2 Darras, 49–65; (2) Le projet de convention concernant les conflits de lois en matière de successions et de testaments, 2 Darras, 644–658, 874–893; Pierantoni, Il diritto civile e la procedura internazionale codificati nelle convenzioni dell' Aja, 1906.

See, also, De l'état actuel des divers traités de la Haye en matière de droit international privé, 4 Darras, 509–549.

The original of the Conventions of June 12, 1902, may be found in 31 Clunet, 748–750, 752–754, 756–757, and in 1 Darras, 215–223.

The original of the Draft of Conventions, signed at the Hague July 17, 1905, may be found in 1 Darras, 789–801.

of having conspired against the life of the husband or wife of one of the parties.

A marriage celebrated contrary to one of the prohibitions above mentioned shall not be void, provided it would be valid according to the law referred to in article 1.

Subject to the application of the first paragraph of article 6 of the present Convention, none of the contracting powers bind themselves to authorize the celebration of a marriage, which, by reason of a prior marriage or an obstacle of a religious nature, would contravene its laws. The violation of an impediment of this nature shall not render such a marriage void in countries other than the one in which it was celebrated.

Art. 3. The law of the place of celebration may permit the marriage of foreigners notwithstanding a prohibition contained in the law mentioned in article 1, when the prohibitions are based exclusively upon considerations of a religious nature.

The other powers may refuse to recognize the validity of a marriage performed under these circumstances.

Art. 4. Foreigners, desiring to marry, must prove that they fulfil the conditions required by the law referred to in article 1.

This proof may consist either of a certificate from a diplomatic or consular agent authorized by the country to which the contracting parties belong, or of any other evidence, which is regarded as sufficient by international treaty or the authorities of the country of celebration.

Art. 5. A marriage performed in accordance with the law of the place of celebration, shall be, as regards its form, considered everywhere as valid.

It is understood, however, that countries whose law requires a religious ceremony may decline to consider as valid marriages entered into by their subjects abroad without observing such requirement.

The provisions of the national law with respect to publication must be observed, but the omission of such publication shall not render the marriage void in countries other than the one whose law has been violated.

An authentic copy of the act of marriage shall be sent to the authorities of the country of each of the parties.

Art. 6. A marriage entered into before a diplomatic or consular agent in conformity with the law of his country shall be regarded everywhere as valid, as regards its form, provided neither of the contracting parties is a subject of the power where the marriage has been celebrated and provided such power does not object to it. It cannot object in the case of a marriage which by reason of a prior marriage or an obstacle of a religious nature would contravene its laws.

The reservation contained in the second paragraph of article 5, is applicable to diplomatic and consular marriages.

Art. 7. A marriage, void as regards form in the country where it was celebrated, may nevertheless be considered valid in the other countries, if the form prescribed by the national law of each of the parties has been observed.

Art. 8. The present Convention applies only to marriages celebrated within the territory of the contracting powers between persons of whom one at least is a subject of one of such powers.

None of the powers obligates itself by the present Convention to apply a law which is not that of one of the contracting powers.

[Articles 9–12 have been omitted.][2]

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[2] The omitted articles of this Convention and of the succeeding Conventions or Draft of Conventions relate to their ratification, application, duration, etc.

II. DIVORCE AND SEPARATION.

Article 1. Married persons may apply for divorce only if both the national law and the law where such application is made admit of divorce.

This applies also to separation.

Art. 2. A divorce may be granted only for grounds admitted by both the national law of the parties and the law of the place where the application is made.

This applies also to separation.

Art. 3. Notwithstanding the provisions of articles 1 and 2, the national law shall be exclusively observed, if the law of the place where the application is made so directs or authorizes.

Art. 4. The national law referred to in the preceding articles may not be invoked where it would render a fact which occurred when the parties or either of them had another nationality a ground for divorce or separation.

Art. 5. An application for divorce or separation may be made:

1. In the jurisdiction competent under the national law of the parties.

2. In a jurisdiction competent according to the law of the place where the parties are domiciled.

Where, according to their national law, the parties do not have the same domicile, the competent jurisdiction shall be that of defendant's domicile. In case of desertion or of a change of domicile after the cause for divorce or separation arose, the application may also be made in the competent jurisdiction of the last common domicile; provided, however, that the national jurisdiction shall be reserved to the extent that it is exclusively competent for an application for divorce or separation. The foreign jurisdiction remains competent for a marriage which is not subject to divorce or separation in the competent national jurisdiction.

Art. 6. Where the parties are not authorized to apply for divorce or separation in the country where they are domiciled, either of them may nevertheless apply to a competent jurisdiction of that country for such provisional relief as its law may provide in the case of a cessation of the life in common. Such relief shall be continued if confirmed within a year by the national jurisdiction; it shall not continue longer than the law of their domicile permits.

Art. 7. A divorce or separation decreed by a court competent according to the terms of article 5, shall be recognized everywhere, provided the provisions of the present Convention have been observed, and, provided the defendant has been cited in accordance with the special provisions of his national law for the recognition of foreign judgments, if the decree has been rendered by default.

A divorce or separation decreed by an administrative jurisdiction shall likewise be recognized everywhere, if the law of each of the parties recognizes such a divorce or separation.

Art. 8. If the parties have not the same nationality, the law last common to them shall be considered as the national law in the application of the preceding articles.

Art. 9. The present Convention applies only to applications for divorce or separation made in one of the contracting powers if at least one of the parties is a subject of one of such powers.

No power shall be bound by the present Convention to apply a law which is not that of one of the contracting powers.

[Articles 10–13 have been omitted.]

III. GUARDIANSHIP.

Article 1. The guardianship of a minor shall be regulated by his national law.

Art. 2. If the national law does not constitute a guardianship in the country of the minor where the latter has his permanent residence abroad, the diplomatic or consular agent authorized by the law of the state of which the minor is a subject may do so in conformity with the laws of that state, provided the state of the permanent residence of the minor does not oppose it.

Art. 3. The guardianship of a minor having his permanent residence abroad, shall be instituted and administered, however, in conformity with the law of that place, if it is not or cannot be constituted pursuant to the provisions of article 1 or of article 2.

Art. 4. The existence of a guardianship created pursuant to the provisions of article 3, shall not prevent the instituting of a new guardianship under article 1 or article 2.

Information of such fact shall be given as soon as possible to the government of the state where the guardianship was first created. Such government shall then inform the authority which instituted the guardianship, or if such an authority does not exist, the guardian himself.

The law of the state where the guardianship was originally created shall decide at what moment such guardianship ceases in the case referred to in this article.

Art. 5. The guardianship shall in every case begin and end at the time and for the causes determined by the national law of the minor.

Art. 6. The administration by the guardian shall extend to the person and over all the property of the minor, wherever its situation.

Immovables subjected by the law of their situs to a special régime applicable to land may be excepted from this rule.

Art. 7. Pending the creation of a guardianship, as well as in all cases of urgency, measures necessary for the protection of the person and interests of a foreign minor may be taken by the local authorities.

Art. 8. The authorities of the state within whose territory there is a foreign minor for whom it is necessary to create a guardianship, shall inform the authorities of the state of which the minor is a subject of this situation as soon as it is known to them.

The authorities so notified shall at the earliest moment indicate to the authorities giving such notice whether a guardianship has been or will be created.

Art. 9. The present Convention shall apply only to the guardianship of minors who are subjects of one of the contracting powers, and have their permanent residence within the territory of one of such powers.

Articles 7 and 8 of the present Convention, however, shall apply to all minors who are subjects of one of the contracting powers.

[Articles 10–13 have been omitted.]

B. DRAFT OF CONVENTIONS SIGNED AT THE HAGUE, JULY 17, 1905.

I. SUCCESSIONS AND WILLS.

Article 1. Successions, as regards the designation of the persons capable of inheriting, the order in which and the shares in the succession to which they are entitled, the collations, the portion of property which can be disposed of and the reserve, are governed by the national law of the deceased, whatever the nature of the property or the country in which it is situated.

The same rule applies to the intrinsic validity and to the effect of testamentary dispositions.

Art. 2. The property of a deceased person shall not escheat to the state in which it is found except when, under the national law of the deceased, there is either no party entitled to it under a will, or there is no party, save the foreign state, entitled to it ab intestato.

Art. 3. Wills are valid, as regards form, if they conform either with the law of the place where they are executed or with the law of the country of which the deceased was a subject at the time of their execution.

However, if the national law of a person prescribes or prohibits a certain form for a will executed outside of his country, a failure to comply with such provision may render the will void in the country of which the testator was a subject; provided that if the will conforms to the law of the place where it was executed, it shall be valid in the other countries.

Wills of foreigners shall be valid, as regards form, if they have been received, in conformity with their national law, by duly authorized diplomatic or consular agents of the state of which such foreigners were subjects.

Art. 4. The provisions of article 1, par. 2, and of article 3, relating to testamentary dispositions, shall be applicable also to the revocation of such dispositions.

Art. 5. The authorities of a state within whose territory property belonging to the succession is found, may take all necessary measures to insure its preservation, unless, under special Conventions, the matter is attended to by duly authorized diplomatic or consular agents of the state of which the deceased was a subject.

Art. 6, § 1. The right is reserved to apply such territorial laws as are exclusively designed to prevent the subdivision of rural property and such laws as relate to immovables placed under a special régime applicable to land.

§ 2. There is likewise reserved to each state the right to apply such laws of the state as possess an imperative or prohibitive character and relate to matters to be indicated by the contracting powers by common agreement in an additional protocol which it is intended shall be ratified at the same time as the present Convention.

§ 3. Each government, in order to avail itself of the reservation contained in the preceding paragraphs, shall furnish to the government of the Netherlands a list of such provisions of its laws as shall be applicable, by way of exception to the rules of the present Convention, to all successions, including those of persons who are subjects of the other contracting powers. Such list may be modified within the limits marked out in the preceding paragraphs in accordance with the wishes of each government which shall notify the Dutch government likewise of such change. This government shall transmit the notifications in question through diplomatic channels to the contracting powers indicating the date when such notifications were received.

§ 4. The reservations made by a state under the foregoing provisions shall apply only to the succession of subjects of the other contracting powers which shall become open 60 days after such notification to the Dutch government.

§ 5. The provisions of the foregoing paragraphs shall not authorize a contracting power to exempt from the operation of the national law of the deceased immovables not comprised within those mentioned in paragraph 1, nor to defeat the application of article 7.

Art. 7. Foreigners belonging to one of the contracting powers shall be completely assimilated with the subjects of such country in regard to all matters mentioned in article 1. Those provisions, therefore, will have no application between the contracting powers which create in favor of the subjects of such country rights of preference in the property situated within its territory, whose effect would be indirectly to modify the rules prescribed by the present Convention.

Such rights of preference, on the other hand, shall be enforced by way of set-off if, as a result of the restrictions made in the application of the law of the deceased, subjects of one state are deprived with respect to property situated within the territory of another state, of the benefit, in full or in part, which they would have had in accordance with the national law of the deceased.

Art. 8. The contracting powers shall by common agreement establish rules concerning jurisdiction and procedure in matters of succession and wills as soon as may be possible after the signing of the present Convention.

The Convention containing such provisions shall be ratified at the same time as the present Convention.

Art. 9. The present Convention shall apply only where the deceased at the time of his death was a subject of one of the contracting powers.

Each contracting power reserves the right to conclude special Conventions with a noncontracting power, in which the succession of persons who are subjects of such country may be subjected to a law other than the national law.

If the present Convention is found to be incompatible, in whole or in part, with a special Convention of this kind, the latter shall apply between the powers that have concluded it, without reference to the present Convention. In such a case the other contracting powers may, on the other hand, decline to enforce the present Convention to the extent that it is excluded by the special Convention.

[Articles 10–14 have been omitted.]

II. THE EFFECT OF MARRIAGE UPON THE RIGHTS AND DUTIES OF MARRIED PERSONS IN THEIR PERSONAL RELATIONS AND UPON THEIR PROPERTY.

Article 1. The rights and duties of married persons in their personal relations shall be governed by their national law.

Such rights and duties can be enforced, however, only with the means which are sanctioned also by the law of the country in which they are to be enforced.

Art. 2. In the absence of contract the effect of a marriage upon the property of married persons, immovable as well as movable, shall be governed by the national law of the husband at the time of the celebration of the marriage.

A change of nationality by the husband and wife or by either of them shall have no effect upon the property régime.

Art. 3. The capacity of each of the future spouses to enter into a marriage contract is determined by his or her national law at the time of the celebration of the marriage.

Art. 4. The national law of husband and wife decides whether during the marriage they can enter into a marriage contract or whether they can rescind or modify their marriage contract.

No change in the property régime can have retroactive effect to the prejudice of third parties.

Art. 5. The intrinsic validity of a marriage contract and its effects are governed by the national law of the husband at the time of the celebration of the marriage, and, if such a contract was made during the marriage, by the national law of the husband and wife at the time of the making of such contract.

The same law determines whether, and if so to what extent, a husband and wife have the power to refer to another law. If they have so referred, such law shall determine the effect of the marriage contract.

Art. 6. The marriage contract is valid, as regards form, if it was made in conformity with either the law of the place where it was executed, or with the national law of each of the future spouses at the time of the celebration

of the marriage, or again, if it was executed during the marriage in accordance with the national law of each of the parties.

If the national law of either of the future spouses, or, if the contract was executed during the marriage, the national law of either husband or wife requires as a condition of its validity a certain form notwithstanding such contract was executed in a foreign country, such provision must be observed.

Art. 7. The provisions of the present Convention are inapplicable to immovables which, by the law of their situs, are placed under a special régime applicable to land.

Art. 8. Each of the contracting powers reserves the right:

1. To require special formalities before a property régime is allowed to operate against third parties.

2. To apply measures having for their object the protection of third parties in their relations with married women engaged in business within the territory of such power.

The contracting powers agree that they will communicate to one another the rules applicable according to the present article.

Art. 9. If husband and wife have acquired the same new nationality during their marriage such a new national law shall apply in the cases mentioned in articles 1, 4 and 5.

If it should happen that during the marriage husband and wife have not the same nationality, the last law common to both shall be regarded as their national law in the application of the preceding articles.

Art. 10. The present Convention does not apply if the law applicable under the preceding articles would be that of a noncontracting power.

[Articles 11–15 have been omitted.]

III. INTERDICTION AND SIMILAR MEASURES.

Article 1. Interdiction is governed by the national law of the person to be interdicted, subject to the exceptions established in the following articles.

Art. 2. Interdiction can be pronounced only by the competent authorities of the state to which the person to be interdicted belongs by nationality and the guardianship shall be created in accordance with the law of such state except in the cases mentioned in the following articles.

Art. 3. If a subject of another state is found in the territory of one of the contracting powers under circumstances requiring interdiction according to his national law, the local authorities may take all provisional measures required for the protection of his person or property.

Notice thereof shall be given to the government of the state of which he is a subject.

These measures shall cease as soon as the local authorities receive notice from the national authorities that provisional measures have been taken or that the condition of the person in question has been determined by judicial decree.

Art. 4. The authorities of the state within whose territory a foreigner requiring interdiction has his permanent residence shall, as soon as it has become known to them, notify the authorities of the state of which the foreigner is a subject, of this situation informing them of any application for interdiction pending before them and of such provisional measures as may have been taken.

Art. 5. The notice mentioned in articles 3 and 4 shall be given through diplomatic channels, unless direct communication between the respective authorities is authorized.

Art. 6. The country in which the person to be interdicted has his permanent residence shall delay all definitive measures so long as the national authorities

have not replied to the notice referred to in article 4. If the national authorities declare that they desire to abstain, or if they do not reply within six months, the authorities of the permanent residence shall hear the application for interdiction taking into consideration the objections which, according to the reply received from the national authorities, would prevent the interdiction in the country of origin.

Art. 7. Where the authorities of the permanent residence are competent by virtue of the preceding article the application for interdiction may be made by the persons and upon the ground admitted by both the national law and the law of the residence of the foreigner.

Art. 8. If interdiction has been pronounced by the authorities of the permanent residence, the guardianship of the person and property of the party interdicted shall be organized in accordance with the local law, and the effect of the interdiction shall be governed by the same law.

If the national law of the person interdicted provides, however, that a certain person shall be entitled as of right to the guardianship such provision shall as far as possible be observed.

Art. 9. The interdiction pronounced by the competent authorities in conformity with the foregoing rules shall, as far as the capacity of the person interdicted and his guardianship are concerned, produce its effects in all of the contracting powers, without the need of an exequatur.

Measures of publicity, prescribed by the local law for interdictions pronounced by the authorities of such country, may be made equally applicable, however, to interdictions pronounced by a foreign authority, or similar provisions may be substituted therefor. The contracting powers agree that they will communicate to one another, through the medium of the Dutch government, the dispositions they may have taken in this regard.

Art. 10. The existence of a guardianship created in accordance with article 8 shall not prevent the creation of a new guardianship in conformity with the national law.

Notice thereof shall be given as soon as possible to the authorities of the state where the interdiction was pronounced.

The law of this state shall determine at what time the guardianship there created shall cease. From this moment the effect of the interdiction pronounced by the foreign authorities shall be governed by the national law of the person interdicted.

Art. 11. The interdiction pronounced by the authorities of the permanent residence may be raised by the national authorities in conformity with their law.

The local authorities which have pronounced the interdiction may raise it likewise upon all grounds recognized by the national law or by the local law. The application may be made by all authorized thereto by one or the other of these laws. The decree raising the interdiction shall produce its effect ipso facto, without the need of an exequatur, in all of the contracting powers.

Art. 12. The preceding provisions shall apply to the movable and immovable property of the incompetent person, alike, save immovable property placed by the law of their situs under a special régime applicable to land.

Art. 13. The rules contained in the present Convention shall apply equally to interdiction properly so called, to the creation of a guardianship for property, to the appointment of a judicial counsel and to all other similar measures resulting in a restriction of capacity.

Art. 14. The present Convention shall apply only to the interdiction of persons who are subjects of one of the contracting powers and have their permanent residence within the territory of one of these powers.

Article 3 of the present Convention, however, applies to all subjects of the contracting powers.

[Articles 15–19 have been omitted.]

IV. BANKRUPTCY.

Article 1. The declaration of bankruptcy of a merchant, pronounced in one of the contracting powers by the authority competent to article 2, shall be recognized and shall produce its effect in the other contracting powers in the measure and to the extent established by the following articles.

Art. 2. The authority exclusively competent to pronounce a declaration of bankruptcy is that of the country in which the debtor has his principal commercial establishment.

The authority exclusively competent with respect to a partnership or corporation (société) is that of the country in which it has its principal place of business, provided that it be neither fraudulent nor fictitious.

Art. 3. If the bankruptcy declared in one of the contracting powers embrace a branch or establishment in another, the formalities of publicity prescribed by the legislation of the latter state must be fulfilled by the syndic or trustee at the place where such branch or establishment is located, without prejudice, however, to conservatory measures or measures of administration mentioned in article 5.

Art. 4. The appointment and the powers of the trustees in bankruptcy, the procedure to be followed, the admission of creditors, the formation of a composition and the distribution of assets among the creditors shall be governed by the law of the place where the bankruptcy has been declared.

Art. 5. Foreign creditors who are subjects of one of the contracting powers shall be completely assimilated with the national creditors.

Art. 6. The syndic, trustee, or other administrator in bankruptcy, duly appointed in accordance with the law of the place where the bankruptcy has been declared, may, without the need of a preliminary exequatur, take all steps or measures necessary for the preservation or administration of the bankrupt estate. He may likewise sue or be sued as the representative of the bankrupt or of the bankrupt estate.

But he can proceed to acts of execution only if the decree under which he acts has been provided with an exequatur in accordance with the law of the country in which such acts are to take place.

Art. 7. The exequatur shall be granted if the applicant proves:

1. That the bankruptcy has been declared by an authority competent according to article 2.

2. That the decree has executory force in the state where it was rendered.

3. That the copy produced contains all the conditions which are necessary for its authenticity under the laws of such state.

4. That the debtor has been duly cited, that he appeared or defaulted.

Art. 8. The procedure with respect to the exequatur is governed by the law of the state where the application is made.

An exequatur may be sought not only by the administrator of the bankrupt, but also by any person entitled to make such application under the law of the country in which the bankruptcy was declared.

Art. 9. A composition, effected subsequent to the declaration of bankruptcy, shall produce its effect ipso jure in all of the contracting powers, provided it was granted by the creditors and confirmed by the competent authority in the manner prescribed by the law of the state where the bankruptcy was opened.

Art. 10. The present Convention does not deprive the contracting powers of the right to apply any measures enacted by their legislatures for the purpose of insuring the continuation of a public service with which a bankrupt establishment may be charged.

It is not applicable either to enterprises in regard to which special legislative measures or regulations have been made in the interest of creditors.

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